Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

SUSAN ROSE, PETITIONER

v.

STATE OF UTAH; UTAH STATE BAR; CAROLYN COX; BARBARA TOWNSEND; ARTHUR BERGER; BILLY WALKER; JOYCE SMITH; AND OTHER JOHN AND JANE DOES AS YET TO BE IDENTIFIED, NAMED JOINTLY AND SEVERALLY, OFFICIALLY AND PERSONALLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED

Regarding attorneys who are challenging judicially-created law, in exclusive Federal or Indian law jurisdiction cases, do state bar associations and state courts have subject matter jurisdiction to prosecute an attorney, without prior discipline orders, at the initiation of opposing counsel Bar-complainants, by claims there "was not good faith arguments" for her to use, with unconstitutional processes, when federal and Navajo courts agree with the subject attorney?

Should a Writ of Habeas Corpus or other Special Writ of Mandamus or Prohibition immediately issue based on a State Bar prosecution, being unconstitutionally *void ab initio* under Article VI and the First Amendment of the United States Constitution, and if the Bar's Prosecution lacks the subject matter jurisdiction ?

Should a Writ of Habeas Corpus or other Special Writ of Mandamus or Prohibition immediately issue based on a State Bar prosecution being unconstitutionally *void* , that does not comport with this Court's United States Constitutional 4th and 5th and 14th Amendment's standards?

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PETITION FOR A WRIT OF HABEAS CORPUS OR ALTERNATIVELY FOR AT SPECIAL WRIT OF MANDAMUS OR PROHIBITION

Summary

This Petitioner respectfully asks that this Petition be reviewed by the same case conference as *Dickson et al v. San Juan County et al*, docket no. 09-997, now docketed. The Utah State Bar is prosecuting this Attorney, upon the initiation by opposing counsel Bar complainants, in two federal/Navajo law cases, for the exercise of her clients' 1st Amendment free speech, [1] and rights to petition their government for redress, based upon her facts, law and litigation choices in the *Dickson* petition "*MacArthur*" cases, and a 'state' Indian law case that was void for jurisdiction and withdrawn with prejudice by the Bar complainant. *Dickson et al v. San Juan County et al*, 2009 U.S. App. LEXIS 26908[2],*2-4 and fn. 2, disagrees with Bar's False Claims."

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[1] Attorney actions are a "liberty" protected by the U.S. Constitution's 14th Amendment. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

[2] **For Navajo Court clients**

MacArthur v. San Juan County et al, "**2002 MacArthur I**" (2002 U.S. App. LEXIS 20987,*;309 F.3d 1216); *MacArthur v. San Juan County et al*, 391 F. Supp. 895 (D. Utah 2005)" **2005 MacArthur II**" (263 pages); *MacArthur v. San Juan County et al*, "**2007 MacArthur III**" (2007 U.S. App. LEXIS 17008,*;497 F.3d 1057)

For FRCP Rule 16 federal law clients

MacArthur et al v. San Juan County et al, 416 F. Supp. 2d 1098, 1201 and fn. 120 (D. Utah, 2005)(MacArthur at 416 F. Supp.2d") (190 pages); *MacArthur v. San Juan County*, 495 F. 3d 1157, 1158(10th Cir. 2007)

"Ms. Rose filed numerous claims, pleadings and appeals that were not supported by the fact and law, for which there was not good faith arguments, and which caused unnecessary delays and expense to the parties and the judicial system."

P. App. 101 par. 106

For the past 10 years this Petitioner faced with this Court's "Montana" doctrine, and Federal Rule of Civil Procedure ("FRCP") at 16, has sought to obtain her *client*'s access to due Due Process and their legal remedies, as Congress intended, and is mandated by *Marbury v. Madison* if it is still sound law, and if the United States Constitution's 5th and 14th Amendments and Treaties are still the Article VI Supreme Law of the Land[3]. About now bout 8 federally-recognized judges, in one way or another, agree there is factual and legal support for her clients' claims.

The State Bar's collateral attack based on Congressionally-intended non-state cases, has been ongoing since 2004 under unconstitutional Utah Rules of Lawyer Discipline and Disability ("RLDD") during the *MacArthur* appeals compromising this solo attorneys work in her first complaint-until-now case.

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[3] *Marbury v. Madison*, 5 U.S. 1 Cranch 137 137, 163 (1803)("for it is a settled and invariable principle ... that every right, when withheld, must have a remedy, and every injury its proper redress." The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.").

Petition

Petitioner Susan Rose respectfully petitions this Court for release from the custody of the Respondents (collectively referred to here as the "Bar"), under Article III, and Congressional authority by this Court granting a Writ of Habeas Corpus relief, under 28 U.S.C. §§ 2241(b); 2242; and 2254(a), or, in the alternative, grant an Extraordinary Writ of Mandamus or Prohibition under 28 U.S.C. §1651, to stop the Bar's prosecution of the Petitioner and mandate all records of the Bar's prosecution be destroyed, providing proof of said destruction to this Counsel by certification under oath, within 15 days. Also, pursuant to Article VI, and 28 U.S.C. §1651, this Petitioner asks this Court to also direct the U.S. District Court to draw a 3 judge panel to examine the Utah Bar rules for their U.S. Constitutionality. *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 486 (1983).

OPINIONS BELOW

No prior Petitions for a Writ of Habeas Corpus relief have been requested. However, other Writs for relief have been uniformly denied under this Court's judicially-created "Middlesex/Younger" (*infra*) federal abstention doctrine: **2/10/2010** 10th Circuit Court denial of a Motion to Stay State Bar Proceedings (P. Ap. 1a); **2/3/2010** Utah Supreme Court denial of Petition (P. Ap. 2a); **2/3/2010** issued **1/29/2010** Utah 3rd District Court denial of stay, denial of motion to dismiss, allowance of sanctions(P. Ap. 5a); **2/2/2010** Utah 3rd District Court granting Bar's motion to compel discovery within 10 days of the order signing, not service (P. app. 9a); **12/16/2009** U.S. Dist. case

2:09cv0695 Denial of (1) an Extraordinary Writ, (2) of injunction, (3) of declaratory relief, of (4) of damages (P. App. 13a); **3/10/2009** U.S. District case 2:00cv0584 "MacArthur" Writ to enjoin denied, finds no disciplinary processes were invoked in federal case (P. App. 34a); **5/14/2009** Utah Supreme Court denies Petition to stop the Bar actions (P. app. 35a); **10/1/2008** U.S. District Court case 2:08cv0592 Writ is denied case dismissed *w/out prejudice* (P. App. 36a); **7/2/ 2008** U.S. District Court case 2:00cv0584 "MacArthur" denies TRO and petition for extraordinary relief (P. Ap. 3a); **7/1/2008** Utah Supreme Court denies Petition for a Writ to stop Bar process (P. App. 47a).

REASONS WHY A WRIT CANNOT BE MADE TO THE LOCAL DISTRICT COURT OR 10TH CIRCUIT COURT

All the foregoing denials demonstrate the lower courts will not grant a writ until this Court clarifies the extent of its federal abstention doctrine found in *Middlesex/Younger*[4] doctrine, and 11th amendment immunity doctrines. *Cf.*, "state abstention" doctrine in *Hawaii/ Taylor III*, and *Stern* and *Younger*'s "state abstention" *exceptions, to federal abstention* [5].

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[4] *Middlesex County Ethics Committee v. Garden State Bar Association* 457 U.S. 423, (1982) and *Younger v. Harris*, 401 U.S. 37 (1971) and *Steadfast Ins. Co.v. Agricultural Ins. Co.*, 507 F.3d 1250 (10 Cir. 2007).

[5] *See, generally, the 'state' abstention doctrine, Taylor III v Kentucky State Bar Association*, 424 F'2d 478(6th Cir. 1970) (preexisting federal case voids later state Bar action that impairs attorney's 1st and 5th amendment rights("…..disbarment proceedings, prior to their adjudication in the court in which the power to disbar resides, are not 'proceedings in a State court,' therefore the federal anti-injunction statute does not apply."); *Hawaii Housing Auth. V. Midkiff*, 467 U.S. 229 (1984)(no state

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2241, 2242, 2254(a), 1651(a) , the United States 1st, 5th, and 14th Amendments, and 28 U.S.C. §1343, and Article III of the U.S. Constitution. This Court holds that Attorney discipline cases, state initiated penalty/forfeiture cases, are quasi-criminal in nature,[6] not civil as Utah RLDD rules demand. RLDD 501. P. App. 73a. This Court holds the Writ of Habeas Corpus relief can extend to quasi-criminal proceedings.[7] In *Counselman*, this Court ruled, the 5th amendment right against self incrimination, applies to quasi-criminal processes not involving solely fines and imprisonment, thus warranting a Writ of Habeas Corpus to release that petitioner. Id. at 573-574.

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proceeding when preexisting federal case exists). *Stern v. U.S. District Court for the District of Massachusetts*, 214 F.3d 4 (1st Cir. 2000) ("an authorization of state regulation is found only when and to the extent there is a clear congressional mandate, specific congressional action that makes this authorization of state regulation clear and unambiguous.").

[6] *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957); *In re Gault*, 387 U.S. 1 (1967)(discipline is quasi-criminal); *Spevack v. Klein*, 385 U.S. 511 (1967) (" The Self-Incrimination Clause of the Fifth Amendment, which has been absorbed in the Fourteenth, extends its protection to lawyers, and should not be watered down by imposing the dishonor of disbarment and the deprivation of livelihood as a penalty for asserting it."); *In Re Ruffalo*, 390 U.S. 544 (1968)(preciseness in pleading).

[7] *Felker v. Turpin*, 518 U.S. 651, 658, 660, 116 S. Ct. 2333, 2340 (1996)(Writ falls under this Court's original jurisdiction); *Waley* v. *Johnson*, 316 U.S. 101, 102 (1942); *Counselman v. Hitchcock*, 142 U.S. 547, 573-574, 581-582 (1892); *Boyd v. United States*, 116 U. S. 616, 631, 633, (1886)(penalty and forfeiture cases are not exempt from the 5th Amendment rights against self incrimination)

RELEVANT PROVISIONS INVOLVED

See appendix

THE ALLEGED SOURCE OF THE CUSTODIAL PARTY'S AUTHORITY

The custodial parties appear to claim their authority by; **(A)** the Utah Constitution's Article VIII sec. 4 [8]; and **(B)** the Utah Supreme Court-authorized Rules of Lawyer Discipline and Disability ("RLDD"), and the Utah Rules of Civil Procedure ("URCP"). (C) It also appears these Respondents are relying upon this Court's judicially-created federal abstention *Middlesex/Younger* doctrine, and 11th amendment immunity doctrines, *Steadfast, supra. Cf., Hawaii/ Taylor III,* and *Stern* and *Younger*'s "state abstention" *exceptions, to federal abstention.*

CUSTODY STATUS

Petitioner is within the Bar's custody by being subjected to State-initiated penalty and/or forfeiture Utah Bar discipline proceedings, this Court holds as 'quasi-criminal' fn. 6 *supra*, in the Utah State 3rd District Court trial for a penalty/forfeiture of her Bar's license, case 070917445, *In re discipline Susan Rose*, the honorable Judge Vernice Trease presiding. (P. App. 5a-12a, 80a). The State Court at the Bar's behest, can hail her into Court at any time, is a demanding she testify and produce evidence against herself, (P. App.

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[8] Article VIII, Section 4. [Rulemaking power of Supreme Court -- Judges pro tempore -- Regulation of practice of law.]

"... The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law. "

5a-12a), wherein the State Court has orally informed this Attorney she cannot use this Court's designated 5th Amendment rights against self incrimination (*Spevack, Boyd, supra*), and denied every conceivable form of relief so far requested. P. App. 7a, and is approving sanctions for this Petitioner's unwillingness to testify against herself or produce documents that might be used against her, for which she is about to be punished. P. App. 9a-12a. . *Counselman, Spevack, supra.*

A motion for default based on this Petitioner's seeking 5th amendment protections is immediately before the court that can result in suspension or disbarment.

STATEMENT

This Petitioner's History- No Discipline

No prior discipline. The Utah Supreme Court by its Order attests to this Attorney's good character and compliance with Bar regulations since this Petitioner's admission to the Bar in 1997. (P. App. 124a). See also, 3rd district court stating, "Additionally, OPC argues that there is no pending criminal or other disciplinary action." P. Ap. 6a. The Bar's claims are not accurate. If they were accurate, presumably the Federal judges would have disciplined this attorney and did not do so or make any misconduct findings. For example, there absolutely were no conflicts in representation where a Navajo member defendant, named officially only, was 100% supportive of the Plaintiffs in his personal capacity and had NO contact with the alleged defendant attorney seeking to represent him to silence him in accord with insurance company reservation of rights

letters driving the defense strategy of total non cooperation. P. App. 121.

And it is any attorney's lifetime accomplishment, for a United States District Court Judge Bruce S. Jenkins and his long time clerk Russell Kearl, to issue its utterly magnificent 263 page, most exhaustive Indian law history analysis judgment of any U.S. Court anywhere in United States Court history, based at least in some part on this Attorneys work. 2005 *MacArthur supra.*

BAR'S OPC matter

Contrary to the Bar's Complaint's charges in the OPC matter, P. App. 80a, U.S. District Court found this Court's *Montana*[9] doctrine should not apply to this Attorney's clients' case, [10] but it had to apply it as it was ordered to do so by the 10th Circuit court without

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[9] *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)

[10] *MacArthur v. San Juan County et al*, 391 F. Supp. 895 (D. Utah 2005) "2005 MacArthur II" (263 pages)("Consistent with the court of appeals' mandate, this court has applied the *Montana* analysis in deciding the jurisdictional issues on remand. Yet *the drastic differences in historical context and current consequence* between the 1933 [Aneth extension] Act and the Crow Allotment Act necessarily raise the question whether *Montana*' s limited reading of the Crow Tribe's authority under its 1868 Treaty has any logical bearing upon the Navajo Nation's authority *under the 1868 Navajo Treaty* over the lands within its boundaries, particularly over *parcels that were purchased with Navajo trust funds and are still held in trust for the Navajo people of San Juan County* ... Viewed through the lens of the relevant Indian policy of the political branches in 1934, the *Atkinson* Court may have erred by importing *Montana*'s "general principle" into the context of the Navajo Nation without examining the historical relevance of *Montana*' s rationale."Id. emphasis added.)

a hearing challenging it initially. See, also, *Dickson* petition, 09-997.

Far from the Bar's 'frivolous' claim, this Court's judicially-created Montana doctrine creates a national emergency. "*Montana*" is now being used to (1) deny completely Navajo parties and members rights to address the Navajo Supreme Court, and (2) has swallowed whole the required study of the other two branches' intentions, required by *Nat'l Farmers*[11]. See, Dickson petition 09-0997. Simply put, all legally injured persons, Indian and non Indian alike, with non Indian defendants residing outside '638" Indian Self Determination Act contracted Indian Nations, are deprived of all access to their only Congressionally designated due process. Dickson Petition. 09-997. It is not unreasonable to say federal courts cannot apply judicially-created law to define Navajo Court jurisdiction, when Congress and the President define it identically to the Navajo Nation's definition by statutes and by mutual agreements, no delegation of authority. Dickson petition 09-997. In *U.S. v. Lara* 541 U.S. 193 (2004) 2004 U.S. LEXIS 2738,*14, this Court recognized Congress' power in Indian affairs is 'plenary and exclusive'. [12]

Contrary to the Bar's complaint, the federal law clients' Lyman and Valdez's claims, in *Dickson*'s *MacArthur* cases at fn. 2, were not dismissed as 'frivolous' by FRCP rule 12 standards. Couldn't be, as there were

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[11] *National Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 855-856, (1985

[12] See, *Lone Wolf v. Hitchcock*, 187 U.S. 553,565 (1903)(Plenary power is not in the Judiciary.)

too many facts and too much undisputed evidence supporting them and the law. *MacArthur* 416 F. Supp. 2d Appendix, *supra.* Neither was there a single order for Plaintiffs there to produce discovery or otherwise cooperate with the Court as they were fully cooperating. Instead, this Petitioner ran into this Court's judicially-created FRCP at 16 wherein this Court's judicially –created rule does not mandate any definitions of 'frivolous' or require an evidentiary hearing prior to dismissal when going outside the Complaint as in Rule 12. [13] Here, the unsigned and unentered pretrial order shows without dispute that this Petitioner marshaled evidence, affidavits, medicare investigation reports, depositions, witnesses, and support for over a hundred of her clients' disputed facts, many for which the defendants claim are disputed, but for which they lacked rebuttal evidence. *MacArthur* at 416 F. Supp. 2d, appendix, *supra.* Dickson petition 09-0997.

Bar's SMITH matter

The Bar's "SMITH" matter case involves Navajo Court jurisdiction over a Navajo mother and son where the

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[13] *See, MacArthur et al v. San Juan County et al*, 416 F. Supp. 2d 1098, 1201 and fn. 120 (D. Utah, 2005), ("120. Neither Fed.R.Civ.P. 16(c)(1) nor the accompanying advisory committee notes articulate the legal standard to be applied in determining whether a claim or defense is "frivolous" within the meaning of the rule. The advisory committee note to the 1983 amendment to Rule 16 makes general reference to a case from the D.C. Circuit, *Meadow Gold Products Co. v. Wright*, 108 U.S.App.D.C. 33, 278 F.2d 867 (D.C.Cir. 1960). .... does not speak of "frivolous" claims. 278 F.2d at 869 (quoting *Rosden v. Leuthold*, 107 U.S.App.D.C. 89, 92, 274 F.2d 747, 750 (D.C.Cir.1960)).")

Bar Complainant opposing counsel's plaintiffs reside in Montezuma Creek Utah. Her case was withdrawn voluntarily with prejudice, (P. App. 48a)) signed by the Judge without reservations for any prior issued orders, after the Navajo Court took full jurisdiction over the Navajo mother and child P. App. 50a, and after the Utah Court of Appeals opined the state court lacked subject matter jurisdiction. P App. 70a. The SMITH matter is exclusively non state by 25 U.S.C. §1901 et seq.

Unequal Treatment

The Bar is treating this Petitioner differently than the Bar Complainants. Bar Complainant Joyce Smith had to withdraw a meritless complaint. Bar Complainant Cox admitted to the Federal court she withheld 5-6 banker boxes of documents, after she previously informed the District Court she provided them all, had overlapping and conflicting representation of her clients, and that she violated Court orders barring motions to dismiss after a set deadline, and did not cooperate in Rule 16 mutual meetings, conceding claims her clients lacked any evidence to rebut. Instead, unlike here, " Because the court found no misconduct on the part of Ms. Cox " (P. App. 115a) there is no basis for probable cause she violated the rules so there is no Bar discipline.

WHY EMERGENCY RELIEF IS NECESSARY

The Attorney is now immediately facing default and sanctions for relying on this Court's rulings that can result in suspension and disbarment. *Gault, Spevack, Counselman, supra.* This Bar's *Middlesex/Younger*

doctrine, like *Montana* and FRCP 16, extinguishes all other Constitutional and Congressional protections for this attorney.

28 U.S.C. §§1651, 2241, 2242, and 2254(a), Article III, and Article VI, mandates the issuing of the Habeas or other writ, when the processes for discipline are *void ab initio* or *void* and repugnant to the U.S. Constitution and federal law. *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 212 U. S. 40 (1909) ("[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.")Emphasis added.

The State Bar acting *ultra vires* of all Federal Constitutional law, and of all the restrictions of Utah's 'reciprocal' RLDD rule 14-522, [14] that unlike *Middlesex, infra,* there is no Utah Supreme Court willing to look at the matter, 3 petitions being rejected. P. app. 2a, 35a, 47a.

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[14] *In the Matter of Welker*, 2004 UT 83 (UT, 2004)(" The language of Rule 22 at present mandates that reciprocal discipline proceedings occur only by the means set forth in that rule.") emphasis already in the text. *Welker* ("Utah's reciprocal discipline rule as it currently stands does not explicitly allow for such input, nor are there means outside the rule whereby the OPC can seek sanctions based on discipline in another jurisdiction."); **RLDD 14-602** reads (" (d) Purpose of these rules. ... They are designed to promote: .... (d)(3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.") See *In the Matter of Stubbs*, Georgia Supreme Court, case no. s09y0476, June 15, 2009 (J Hines Dissent)(" In fact, only one judge in the country has opined that federal-to-state reciprocal discipline is not appropriate because a federal court is not "another jurisdiction").

Contrary to the Bar's belief no "good faith argument exists" for challenging these doctrines, (P. app. 101a par. 106) this Attorney is correct in that the United States bars all state law and state courts within the Navajo Nation. [15] Congress has never intended for Federal courts to any authority over the Navajo Nation courts, save habeas corpus authority. [16] 25 U.S.C. §1303. It provides for BIA appeals, if there is any injury. 25 U.S.C. 450f. Right now, by '*Montana*" deprives an entire class of persons of ANY access to Congress' designated redress, [17] here with defendants who well knew absolutely they were driving patients away from the only health care available within 65-100 miles, when they told the Navajo Court they were not. P. App. 123a.

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[16] *Dickson* Petition 09-997. Treaty of 1849, 1868, Treaty of Guadalupe Hidalgo, the 1933 Aneth Extension Act, and 1937 Appropriations act.

[15] *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855-856(1985); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49(1978); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, (1987).

[17] *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir.2005)(self-vacated to allow *Nat'l Farmer, infra*, analysis). In a 9th circuit-referred Navajo tort law, Ford Motor case, the Navajo Nation Supreme Court Chief Justice Herbert Yazzie, in Navajo case, *Ford Motor v. Kayenta District Court* SC-CV-33-07, forthrightly asked Ford Motor's attorney in oral argument to the effect, (1) "How many dead Indians does it take before the Navajo Nation's Courts have jurisdiction?"; (2) to the effect, "Do these plaintiffs have any other courts into which they can go to receive redress?" The Ninth Circuit Court shared this same concern in oral argument in *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir.2005)(self-vacated to allow *Nat'l Farmer, infra*, analysis) after the case came back to the 9th Cir. from the Navajo Supreme Court, whereupon Ford settled the case. The United States District Court in"2005 *MacArthur*" at fn. 135, sees a third. (3) ""If, Indians reasoned, justice is for society's benefit, why isn't our justice accepted?"

South eastern Utah has a pattern of being politically non- Indian. Now the Bar's anti-Indian retaliation against this Attorney is consistent with Utah's Indian history (P. App.108-112a). Notably, Utah's powers that be, apparently retaliated against a prior federal judge after his ruling for Paiute Indians. He suffered great retaliation and personal loss.[18]

REASONS FOR GRANTING THE PETITION

I. NO STATE 'EXHAUSTION' IS AVAILABLE IN VOID AB INITIO AND VOID CASES

If the State Bar's case as a matter of law is *void ab initio*, or *void*, it never becomes final, and there is no ability to exhaust, as it is good for nothing[19]. Utah's Supreme Court advises that if the lower district court lacks jurisdiction so does the appellate court. *Crump v. Crump*, 821 P.2d 1172 (Utah App., 1991)

II. THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE EXERCISE OF THIS COURT'S JURISDICTION IN BOTH THE DICKSON AND THIS PETITION

The Bar's prosecution as discussed below is *void ab initio*. Id. They are also void for lack of due process.

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[18] Judge Ritter suffered greatly for his judicial protection of Indian rights as shown in *U.S. v. Hatahley*, 257 F.2d 920 (1958). See for analysis, Debora L. Threedy. 2008. "United States v. Hatahley: A Legal Archaeology Case Study of Law and Racial Conflict" at http://works.bepress.com/debora_threedy/2; (P. App. 108a) Showing the Indian law history of southeastern Utah's San Juan County.

[19] *Taylor, III, Hawaii, supra*, *Freytag v. Commn'r*, 501 U.S. 868 (U.S. 06/27/1991)(J. Scalia, concurrence);*Elliot v .Piersol*, 26 U.S. 328, 340 (1828); *In re Green*, 369 U.S. 689, 692, 1116 (1962); *Ex parte Bradley*, 74 U.S. 364 (1868)(an attorney cannot be prosecuted for alleged contempts before another tribunal).

[20] the Bar's preexisting cases are federal in nature, all within this Court's ***exclusive*** jurisdiction[21] fitting the Younger exceptions to federal abstention, mandating 'state abstention' under *Hawaii, Taylor III.*

The *Younger* Court identifies three *non-discretionary* categories of exceptions to its judicially-created federal abstention doctrine – (1) where irreparable injury is "both great and immediate," 401 U.S., at 46, (2) where the state law is "'flagrantly and patently violative of express constitutional prohibitions,'" 401 U.S., at 53, or (3) where there is a showing of "bad faith, harassment, or . . . ***other unusual circumstances*** that would call for equitable relief." 401 U.S., at 54.

The Great Habeas Corpus Writ was designed expressly to relieve persons being subjected to unconstitutional state processes. Fn. 4 *supra.* The Habeas Writ does not need to comply with 1651's or other statutory mandates. Id.

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[20] *Grayned v. City of Rockford*, 408 U.S. 104-1108-109(1974); *Goldberg v. Kelly*, 397 U.S. 254 (1970)(due process attaches at all levels of process); *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976); *Board of Regents v. Roth*, 408 U.S. at 573, (1971); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."); *Cooke v. United States*, 267 U.S. 517, 537 (1925).

[21] *Federal Trade Commission v. Dean Foods Co. et al*, 1966 U.S. LEXIS 2985,*19; 384 U.S. 597; 86 S. Ct. 1738;16 L. Ed. 2d 802("It must be remembered that the courts of appeals derive their power to grant preliminary relief ... from the All Writs Act and its predecessors dating ***back to the first Judiciary Act of 1789***. Congress ***has never*** restricted the power which the courts of appeals may exercise under that Act. ...."). emphasis added.

III. ALL FOUR PRONGS FOR INJUNCTIVE RELIEF ARE MET IF HABEAS RELIEF IS NOT POSSIBLE

Under Article VI, the four prongs are automatic. There is never is harm to enjoining a *void ab initio* process, or *void* process, (1) there is always irreparable harm when a person for a penalty/forfeiture of their livelihood is being subjected to *void ab intio* or *void* processes (fn. 18, Taylor III, *supra)*; (2) There is never harm to the Bar using such repugnant processes; (3) the public policy is always upheld by granting the Habeas Writ that upholds the U.S. Constitution, and Congressional laws, enjoining acts that don't legally exist under the U.S. Constitution and federal pre emption doctrines, and granting the writ maintains the *status quo*, (P. App. 124a), and given all the foregoing there is a strong likelihood of success in obtaining the writ. FRCP 65 protections are all met, see, *Taylor III*, *Younger*, *Hawaii*, *Turpin*, *Counselman*, *fn. 4 supra.*

IV. THE BAR PROCEEDINGS ARE VOID AB INITIO

The Bar's case is based on two underlying federal/Navajo jurisdiction cases. *Hopkins v. Walker*, 244 U.S. 486 (1917). See (1) *Dickson* petition (Bar complaint OPC matter), "*MacArthur*" cases, and (2) a State 7th District case that was really a Navajo/Federal law case lacking jurisdiction. Bar complainants are opposing counsel in both cases.

Congress has enacted no laws giving State Courts or State Bar associations any authority to define Navajo Court jurisdiction at all or under the guise of attorney discipline cases. All are *void ab initio*. *Fn. 19, supra.*

There are now five claims for relief based on the Bar's proceedings being ***void ab initio*** (fn. 17 *supra*); **(1)** Lack of standing. Without the pre existing original federal court issuing discipline orders, the Bar has no proof of misconduct, no injury, no standing.[22] **(2)** Utah lacks the Congressionally-identified ***exclusive*** federal court structural 'inherent' authority to discipline an attorney in the first instance. [23](P.App 34a, 45a,

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[22] See, Bar's admission, (P. Ap. 115a), *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 572 (1992); *Taylor III, Utah's Welker, 1st cir. Stern.*

[23] **Supreme Court and other rulings** *Ex parte Robinson*, 86 U.S. 505, 513(1873)("The seventeenth section of the Judiciary Act of 1789, in prescribing fine or imprisonment as the punishment which may be inflicted by the courts of the United States for contempts, operates as a limitation upon the manner in which their power in this respect may be exercised, and is a negation of all other modes of punishment.")Id.; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-765 (1980)(" The **inherent** powers of federal courts are those which "are necessary to the exercise of all others." ..."); *Cooke v. United States*, 267 U. S. 517, 539 (1925); *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 221 U. S. 450-451 (1911)(**"If a party can make himself a judge of the validity of orders which have been issued, [here refusing discipline] and by his own act of disobedience set them aside, [Bar complainant using the Bar instead of appeal courts], then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.");** *Green v. United States*, 356 U. S. 165, 356 U. S. 193-194 (1958) (Black, J., dissenting); *Ex parte Bradley*, 74 U.S. 364 (1868)(an attorney cannot be prosecuted for alleged contempts before another tribunal) and *Ex Parte Bradley*, 86 U.S. 513 (October 1873) (mandamus is proper to keep inferior courts within their proper bounds); *Re Frank Winn*, 213 U.S. 458 (1909)(a cause can be removed to a federal court if it could be brought in the original court); *Virginia v. Rives*, 100 U.S. 313, 323, 25 L.Ed. 667 1879)(mandamus is appropriate to prevent proceedings lacking jurisdiction.). Fox, THE SUMMARY POWER TO PUNISH CONTEMPT,

Dickson). Only the Court of proper jurisdiction, knowing all the surrounding circumstances can discipline an attorney initially, *in the first instance.* (3) Under Article VI, Congress and this Court and the President signing legislation, have a complex designated *exclusive* federal attorney discipline plan and the State lacks subject matter jurisdiction anywhere in it (Id.) based upon: **(A)** Article III, **(B)** the Judiciary Act of 1789 sec. 17, **(C)** Congress' rulemaking act 28 USC §§2071 and 2072 eliminating ***all other law contrary*** to federal rules, **(D)** Federal Rules of Civil Procedure at 83 (28 U.S.C.A. Federal Rules of Civil Procedure 83), **(E)** U. S. District Court local rule DUCivR 83.1.5.1. *et seq.*[24] As Article III law, it is Article VI, Supreme Law of the Land, binding on states, consistent with Utah's *Welker* warranting consistency between jurisdictions, that the Bar is violating, see *Stern, supra;* (4) Lack of the underlying case's subject matter jurisdiction. Congress does not authorize Utah's Bar and Courts to second guess federal judges in exclusively federal cases, Navajo, trademark, federal taxes, etc. by charging the attorney had no 'good faith arguments' to use. *Freytag, supra.* (5) First Amendment immunity. Lawyers are not to be prosecuted for facts, law, litigation choices under the 1st Amdt.'s rights of free speech and freedom to petition for redress, [25] especially without an evidentiary

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25 L.Q. Rev. 238, 252 (1909)

[24] Article VI applies, see *Winch v. Henry*, 2009 U.S. App. LEXIS 3034,*2; 555 F.3d 1199; *The Skull Valley Band of the Goshutes, et al v. Utah, et al*, 2004 U.S. App. LEXIS 16055,*42-43;376 F.3d 1223; *Tennessee v. Davis*, 100 U.S. 257, 258, 264 (1879).

[25] *See In re Primus*, 436 U.S. 412, 432-433, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 355, 365, 384, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977); *State of Oklahoma*

hearing by the original federal courts of proper discipline jurisdiction, as Utah's RLDD 14-522 admits. P. Ap. 78a.

V. BAR PROCEEDINGS ARE VOID

There are four more claims based on Bar Proceedings being unconstitutionally *void.* Due Process requires a 'meaningful hearing' at a 'meaningful time' before an 'impartial' tribunal with subject matter jurisdiction, upon 'adequate notice' of charges under procedural rules that are not vague resulting in arbitrary actions, at all levels. *Fn.20 supra.*

(6) The Utah RLDD rules, are unconstitutional based on vagueness, (*Grayned, supra*) and 5th Amendment violations, whereby they are a combination of RLDD **14-501(c)**'civil' nature[26] of process not quasi criminal (P. App.73a); **14-517** 'preponderance of evidence'[27] not clear and convincing (P. App. 73a); **14- 510**'s (a)lack of a notarized complaint, (b) lack of being on notice that opposing federal court counsel Carolyn Cox was a bar complainant so she could be called as a witness in the discipline 'cookie cutter' 1 hour hearing for each of the two charges wholly inadequate to defend years of Indian law litigation within, (c) no right of this Petitioner's attorney to examine and cross examine

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v. Porter, 766 P.2d 958, 966-970 (Okla. 1988); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991) [*12] (Kennedy, J., dissenting in part) . Attorney actions are a "liberty" protected by the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666, 69 L. Ed. 1138, 45 S. Ct. 625 (1925).

[26] 5th and 14th amendments require 'quasi-criminal' nature, *Gault, Ruffalo, supra.*

[27] 5th and 14th Amendment requires 'clear and convincing'. *Addington v Texas*, 441 U.S. 418, 424- 425 (1979)

witnesses, or even know who they are[28] fn. 18 *supra* (P. App. 74-76a); **14-510(b)(6)(E) and 511** [29], NO of standards for finding "probable cause" making all 14-510 such findings 'arbitary' (P. App. 76a)(*Grayned, supra*); **510(b)(6)(E)** referrals to public discipline in a state *lower* court, lacking authority to hear and rule on U.S. Constitutional defenses, [30]*supra*, making referrals to public trial in a lower court, an arbitrary act impossible to defend against to maintain freedom from being publicly stigmatized[31]; **510(f)**'s lack of *equal* access of all Attorneys, to the Utah Supreme Court for review; and, the RLDD rules entire (a) lack of any ability to immediately challenge the lack of

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[28] 5th and 14th Amendment requires adequate notice, precise nature of the charges and penalties sought, and examination and cross examination where your reputation is at stake, *Id.*, is missing here.

[29] **Rule 14-511. "Proceedings subsequent to finding of probable** cause.(a) Commencement of action. If the screening panel finds probable cause to believe that there are grounds for public discipline and that a formal complaint is merited, OPC counsel shall prepare and file with the district court a formal complaint setting forth in plain and concise language the facts upon which the charge of unprofessional conduct is based and the applicable provisions of the Rules of Professional Conduct. ..."

[30] *In Re Discipline of Johnson*, 2001 UT 110¶¶21,23 (J. Durham concurrence and Dissent.)("¶21 and ¶23 ***Trial courts have a more limited perspective on the disciplinary system than does this court.*** A trial judge is often called on to "predict" the answer to a question of first impression involving the rules and the scope of appropriate sanctions. ***It is not at all unexpected that a trial judge's best assessment of the trend of developing law turns out to be "wrong"*** in the sense that this court will reject it and opt for a different interpretation or policy. **Where the judgment is equivalent to a professional death penalty, I believe that this court's review should precede execution.")** Emphasis added.

[31] 5th and 14th Amendments require clear standards known to all, vague standards or lack of them, voids the process and the decision from it. *Grayned, supra.*

Constitutionality of the RLDD rules to the Utah Supreme Court where here, 3 petitions have been rejected, (P. App. 2, 25, 47a) and (b) lack of ability to exercise one's 5th Amendment rights, and (c) referral to a lower court lacking authority to rule on the Constitutionality of the Highest Court's rules, and thus an Attorney's Federal Constitutional defenses, all show this Attorney's original process, from which this Attorney was referred to public trial and discipline is *void* for lack of U.S. Constitutionality, outside Utah's RLDD 14-522 that is the only rule the Utah Supreme Court says the Bar is to use [32] for prosecuting an attorney in 'another court' or in 'another jurisdiction, violating *Mathews, Roth, Goldberg, supra.* [33]

(7) The Bar's Complaint fails to meet "*Ruffalo*" pleading standards of preciseness for Due Process adequate notice; (a) The Bar's Complaint lacks an quantified 'prayer for relief' (P. App. 107a). It is unknown if the Bar seeks disbarment or suspension or public reprimand creating a trap for the unwary attorney the Court is demanding to answer production requests for. *Ruffalo, supra.* (b) The hearsay statements of Judges, taken out of the context of all surrounding circumstances are pled as 'facts' where the Judges probably cannot be called as witnesses under FRE and URE 605 for the Constitutionally- required examination and cross examination (*fn. 18 supra*). (c)

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[32] *In the Matter of Welker*, 2004 UT 83 (UT, 2004).

[33] Wrong rule and lack of subject matter jurisdiction results in Due Process deprivations: *State Dep't of Soc. Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989); *Thiele v. Anderson*, 975 P.2d 481 (Utah App., 1999); *In re B.A.P.*, 2004 UT App 84 (Utah App. 4/1/2004), 2004 UT App 84 (Utah App., 2004).

The alleged 'facts' are not pled within the elements of the 'claims' so it is a guessing game as to what the Bar intends by its 'claims', and there is no ability to defend against why or how alleged facts do not constitute the claims. (d) The Complaint's equally generalized 'claims' fall within four primary categories:

(A) failure to support claims with fact and law [34]**(not true)**(*Dickson, supra; MacArthur 2005 (263 pages) and MacArthur* 416 F. Supp 2d, and its *appendix, supra* (190 pages);
(B) Conflicts in representation (P. app. 99a, par. 99-101; par. 116-118)**(not true)**(P. app. 87a).

(C) failure to expedite litigation and (Par. 108-115) and prejudicial to justice (par. 122-137) **(not true)**(the Smith matter case should never have been brought, and this Court keeps changing the *Montana* doctrine such that new claims for relief arise or fall on each new pronouncement, and not just for this case) [35]

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[34] Complaint p. app. 80a, par. 94-95 (count one); 97-98(count two); 103-104(count four); 106-107(count five), 123-126 (count ten), 128-131(count eleven). But see, contrary, *Dickson, supra* and *2005 MacArthur* and *416 F. Supp. 2d MacArthur*'s attached unsigned pretrial order, *supra, and 2005 MacArthur, and Dickson, supra.*

[35] **The norm for Indian *Montana* jurisdiction cases is 10 + years because the doctrine is ever changing.** *Nevada v. Hicks*, 533 U.S. 353 (2001) (ten year tribal state sovereignty dispute); *Ford Motor Company v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005)(having been decided by the Navajo Court and settled after oral argument about 10 years); *Atkinson Trading Post v. Shirley*, 532 U.S. 645 (2001)(Indian/non Indian jurisdiction question 8 years); *Sinanjani v. Board of Education of San Juan County*, 10th Circuit Court, No. 99-4130 Nov. 30, 2000(several appeals involving a 25 year consent decree challenged by San Juan County School district and its duty to Navajo children taken from their homes to schools outside their Nation); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d

(multijurisdictional federal copyright, trademark, etc. cases take much longer generally than state cases);
(D) Claiming this Attorney made disparaging remarks about a Judge (par. 119-120)(**not true**) without citing to which statement, or how or why they claim any remarks against *Utah's legal communities* highly **anti Indian** atmosphere is 'disparaging' to him. Again, no facts plead in the context of the claims. The Judge recused admitting the Plaintiffs' perception of the appearance of bias was correct. *Nichols v. Alley*, 1 F.3d 347, 351 (10th Cir. 1995)

(8) Unconstitutional Court processes. As long as the lower 3rd District Court is bound by 'civil' and other unconstitutional RLDD rules, this Court's designated 'quasi-criminal' standards are violated, and the process is void. *Grayned, Ruffalo, Gualt, Addington, supra.* But the lower Court can't be recused, as Utah's Rules of Civil Procedure at 63 [36] only allow one recusal motion per case. There has been *ex parte* contacts between the Bar and the 3rd District Court, resulting in a telephonic hearing with this Petitioner in an exray laboratory prior to surgery, because the Bar reschedule the hearing and the Court would not allow a demur from its date. There have been Court's orders this Petitioner was never served with she had to repeatedly request to be served with. Not an impossibility given the case loads of over a 1000 estimated cases pre state court judge. No one will correct the errors in the docket. Factual findings, are what the OPC say they

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818 (10th Cir. 2007) (State/Indian jurisdictional authority for taxing motor vehicles), nine years, three appeals.

[36] Utah RCP Rule 63 "(b)(1)(C) .... No party may file more than one motion to disqualify in an action."

are, P. ap. 5a, 9a, and not just in the state court, but also in Utah's federal district court, P. App. 13a, where the Court just uses the Bar's motions to dismiss nearly verbatim with their same errors also. Now on appeal in the Tenth Circuit court, case 10-4000.

CONCLUSION

So far, the facts of this Petitioners cases have been shocking and disturbing, that Navajo and Federal and State courts did not *initially* believe, then upon review of the evidence, did believe. Relying on the Court's premature criticism of this attorney, the Bar with opposing counsel's assistance fabricates a Bar Complaint, p. ap. 80a, that has nothing to support their claims of misconduct, never found by the federal courts involved.

Seeking relief in the federal countersuit to the Bar, has been futile with the federal courts, like the state courts, relying on the Bar's presumptions of correctness. Judge Campbell refused to enjoin the Respondents also relying on whatever the Bar told the Court, just passing the case up the line, including relying on *Canatella*, a California 'reciprocal' discipline case[37],

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[37] The D.C. judgments *in error*, cites to Defendants' favored case below, *Canatella v. California*, 404 F. 3d 1106, 1110 (9th Circuit 2005) 2005 U.S. App. LEXIS 5881,*;404 F.3d 1106, *as if* it dealt with 'first instance' trials of attorneys for acts in the ***pre existing*** federal court actions. App. 241. But, 2005 *Canatella*, 404 F. 3d, cannot be fairly read in isolation from *Canatella v. California*, 2002 U.S. App. LEXIS 18476,*;304 F.3d 843. ("Prior to 1989, *Canatella* had no record ..... Between 1989 and 1996, federal and state courts imposed monetary sanctions against *Canatella* on twenty-six occasions"). *Canatella* is thus a '*reciprocal*' discipline case. Bar Defs do not cite to one case on point supporting their claimed 'geographical' jurisdictional authority over all attorneys in Utah. None exists.

that some of the Respondents did not fully advise was a 'reciprocal' case, that the OPC admits to the state court is not applicable here. P. app. 6a. This attorney did not use 42 U.S.C. §1983 in her 2009 case, as defendants claim had to be used, and instead brought claims to stop the process and get other relief directly under the Constitution and 28 U.S.C. §1343. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979) ("....Where the underlying right is based on the Constitution itself, rather than an Act of Congress, § 1343(3) obviously provides jurisdiction.")

If the doctrines of *Montana*, of FRCP 16, and 11th amendment immunity, and *Middlesex/Younger* are so well entrenched that a party need not even show up because what ever the government says is taken as 100%, then all citizens are 2nd class. The OPC has already brought and lost two prior cases without fact and law supporting them, *Welker*, and *In re Sonnenreich*, 2004 UT 3, ¶ 12, 87 P.3d 712 (costing the attorney about $38,000 to fight the Bar). But to force an attorney to go through suspension and disbarment, here possibly by default for this Petitioner seeking 5th Amendment protections, in a contingency case (OPC matter), and in a pro bono case (SMITH matter) where the only bill for hours was submitted to defendants and Truck Insurance, after an award of costs and fees to the Plaintiffs and their counsel, in Navajo Court, for wasting the attorney's time and resources in the defendants' bad faith litigation. As in *Spevack*, the Bar is seeking all this attorney's records, without outstanding discipline or criminal charges.

Even if the Writ is granted, this Attorney in whatever endeavors she pursues in and outside of the law, is saddled with the public accusations of the Bar that anyone can use over and over to attack this person with, and even if this Court as part of relieving this attorney from the Bar's custody orders it to destroy all records in its possession of this Attorney's prosecution. Like unto Judge Ritter, the Bar's prosecution ultimately destroys this Petitioner's life, and reputation *per se*. But the State should not be able to take an attorney's license under the foregoing conditions, and they ultimately admit they agree in their letters denying similar prosecution of the Bar complainants. P. ap. 113a.

For all the foregoing reasons, this Court should grant this Petition

Respectfully submitted,

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(801) 674-9304, (801) 572-3363

VIII. JURAT VERIFICATION

I, Susan Rose, Utah Bar No. 7985, as a member of this United States Supreme Court's Bar, solemnly state under penalty of perjury, that to the best of this Petitioner's information and belief, all the foregoing statements contained herein, are true and accurate, and the State Courts orders were obtained from the State Courts certified, and the Federal Courts orders were obtained over PACER. All the documents in the

appendix are herein certified as representative of the relevant content of the original papers.

/s/ Susan Rose (Smith-Schildmeyer) (Utah Bar No. 7985)

(any footnotes trail end of each document)

No. 10-4000

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUSAN ROSE, Plaintiff-Appellant,

v.

STATE OF UTAH; UTAH STATE BAR; CAROLYN COX; BARBARA TOWNSEND; ARTHUR BERGER; BILLY WALKER; JOYCE SMITH; and other JOHN AND JANE DOES as yet to be identified, named jointly and severally, officially and personally, Defendants- Appellees.

ORDER

Before KELLY and LUCERO, Circuit Judges,

This matter comes before the court on appellant Susan Rose's "Rule 8 Motion to Stay" filed February 3, 2010, and her "Verified Rule 8.2 Motion for an Emergency Stay" filed February 5, 2010, In each of these motions Ms. Rose, an attorney licensed to practice in Utah, seeks a stay of ongoing disciplinary proceedings against her in Utah state court.

To obtain a stay pending appeal, Ms. Rose must demonstrate 1) that she is likely to prevail on appeal; 2) that she will suffer irreparable harm if the stay is not granted; 3) that her harm absent a stay outweighs any harm to appellees if the stay is granted; and 4) that issuance of the stay is not contrary to the public interest. See 10th Cir. R. 8.1; Kikimura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001). Having reviewed the materials submitted by Ms. Rose, we conclude that she has not met the stay factors.

Accordingly, both the "Rule 8 Motion to Stay" and the "Verified Rule 8.2 Motion for an Emergency Stay" are DENIED.
Entered for the Court /s Elizabeth Shumaker Court Clerk
(PACER copy)

Case No. 20091050-SC

IN THE SUPREME COURT OF UTAH

Susan Rose, Petitioner,
v.
Utah State Bar & Third District Court Judge Vernice Trease, Respondents.

ORDER

This matter is before the Court upon a Petition for Interlocutory Appeal filed on December 21, 2009.

IT IS HEREBY ORDERED the Petition for Interlocutory Appeal is denied.

2-3-10 /s Mathew B. Durrant
Associate Chief Justice

(certified copy)

Civil No. 2:00-CV-584BSJ

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DR STEVEN MACARTHUR et al.,
Plaintiffs,
vs.
SAN JUAN COUNTY, et al., Defendants.

Judge Bruce S. Jenkins

ORDER RE: PLAINTIFFS' "RULE 65 AND 25 U.S.C. 1651 APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PRELIMINARY OR PERMANENT INJUNCTION SHOULD NOT ISSUE"
(Fed. R. Civ. P. 65)

On June 11, 2008, plaintiffs Singer, Riggs and Dickson filed a motion for temporary restraining order and other extraordinary or equitable relief (dkt. no. 996), with respect to a proceeding now pending in state district court and involving. plaintiffs' counsel and the Utah State Bar's Office of Professional Conduct.

Having reviewed the plaintiffs' motion and memorandum, It appears that plaintiffs' counsel misapprehends the nature of this court's May 12, 2008 bench ruling, now set forth in written form in a Memorandurn Opinion and Order filed today, Nothing about the equitable relief granted by this court forecloses plaintiffs' counsel from presenting any argument in defense of her conduct in representing

these plaintiffs in this proceeding in the separate proceeding now pending before the state district court.

"All attorneys admitted to the bar of this court are subject to the disciplinary jurisdiction of this court," DUCivR 834,5(a)(1), and generally, questions involving the professional conduct of attorneys adrnitted to the Bar of this court that arise in' proceedings before this court are matters for this court to consider in the first instance, following the procedure prescribed by this court in its own local Rules. See DUCivR 83

Be that as it may, the threatened injury alleged in the plaintiffs' moving papers that may result from the pending state court proceeding appears to be injury to plaintiffs' counsel individually, and not to the plaintiffs themselves, In the context of this case, plaintiffs Singer, Riggs and Dickson thus lack standing to seek preliminary injunctive relief as to the pending state court proceeding Involving their counsel and the other non.parties named in the pending motion. The proper parties to a proceeding for such equitable or extraordinary relief are not before this court,

Consequently,

IT IS ORDERED that Plaintiffs' "Rulo 65 and 25 U.S.C. 1651 Application for a Temporary Restraining Order and Order to Show Cause Why a Preliminary or Permanent InJunction Should Not Issue" (dkt. no. 996), is hereby DENIED in all respects.

DATED this 2 DAY of July, 2008.

/s Bruce S. Jenkins

(PACER COPY)

Case No. 070917445
IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of

SUSAN ROSE, #07985,
Respondent.

Judge Vernice Trease

MEMORANDUM DECISION

THIS CASE IS BEFORE THE COURT on Respondent's motion to dismiss filed on October 7, 2009. The Office of Professional Conduct ("OPC") submitted a memorandum in opposition on October 14, 2009. Respondent fled a reply on October 20, 2009. Respondent's motion to stay is also before the court. The motion was filed on October 13, 2009, OPC filed a memorandum in opposition on October 23, 2009, and Respondent filed a reply on November 2, 2009. The court has reviewed the pleadings and determined oral argument is not necessary and will not assist the court in rendering a decision. The issues are authoritatively resolved by clear law.

ARGUMENTS

Respondent moves the court to dismiss this matter under rule 12(b)(b) for lack of subject matter jurisdiction.[1] She contends that the court lacks jurisdiction because OPC violated rule 14522 of the Utah Supreme Court's Rules of Lawyer Discipline and Disability when it brought the present disciplinary action against her before producing any evidence that she been disciplined in another court. In response, OPC contends that Respondent raises her fourth motion to dismiss under rule 12(b)(1) and 12(b)(2); Respondent misapprehends rule 14-522; OPC followed the proper procedure under the rules for bringing this action; and finally, this court has subject matter jurisdiction, which the court has already determined. OPC requests attorney fees for its time in responding to this motion.

Respondent moves the court to stay these proceedings due to the substantial similarity of the pending matter before the Tenth Circuit Court of Appeals or until the matter is prosecuted in the original courts. OPC responds by contending that this is the seventh motion for a stay in this matter, all of which the court denied. OPC contends that this motion should likewise be denied because there is nothing for the court to stay in the matter until there is a final judgment. Additionally, OPC argues that there is no pending criminal or other disciplinary action and that the civil action Respondent filed in federal court is not substantially similar. OPC requests attorney fees for its time in responding to this motion.

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[1] In fact, a motion to dismiss for lack of subject matter jurisdiction is properly brought under rule 12(b)(1). See Utah R. Civ. P. 12(b)(1).

DISCUSSION

Motion to Dismiss

Respondent has filed numerous motions to dismiss for lack of subject matter jurisdiction.[2] Each time, the court ruled that it has jurisdiction; none of the facts or circumstances have changed and the court's ruling stands.

Respondent raises her rule 14-522 argument for the first time, yet her underlying argument is repeated from previous motions to dismiss. In each motion, Respondent fails to understand that OPC may bring an action in this court for Respondent's conduct in a federal district court matter. As OPC states, it has prosecuted this matter under rule 14-510, and jurisdiction is proper under rule 14-511. See Utah R. Judicial Admin Rule 14-510 (disciplinary action initiated with an informal complaint and review and investigation by a screening panel); -511 (a) (OPC may file a complaint with this court upon finding by screening panel of probable cause). Rule 14-522 has no bearing on this court's jurisdiction and, regardless, this is not a reciprocal discipline case because Respondent was not formally disciplined in the two actions in which OPC alleges Respondent violated the Rules of Professional Conduct. See Utah R. Judicial Admin Rule 14-522.

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[2] Although some of Respondent's motions to dismiss for lack of subject matter jurisdiction have been filed under a different name, for example as a 12(h) motion or as various motions for summary judgment, in substance they have all been motions to dismiss under 12(b)(1). For convenience, the court refers to them collectively.

Motion to Stay

Respondent has filed at least seven motions to stay during the course of these proceedings, all of which the court denied. Respondent's civil matter was not sufficiently similar to justify staying proceedings in the instant matter and, in any event, Respondent's concurrent federal action against the Utah State Bar has been finally adjudicated. There are no appeals pending and no reason whatsoever to delay proceedings. This matter should proceed through discovery and to trial as soon as possible.

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss and Motion to Stay be and hereby are denied.

Counsel for OPC is designated to prepare an appropriate order consistent with the court's ruling.

DATED this 29th day of January, 2010.

/s Judge Vernice Trease

(Certified copy

Case No. 070917445
IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE DISCIPLINE OF:
SUSAN ROSE, #07985,

Judge Vernice Trease

MEMORANDUM RULING

This case is before the Court on the Office of Professional Conduct's ("OPC") Combined Motion to Dismiss fled on September 24, 2009. The Respondent submitted a memorandum in opposition on December 22, 2009. In Respondent's memorandum in opposition she also asserts a protective order request and re-asserts her Rule 12(b)(6) argument. OPC filed a reply on January s, 2010.

This memorandum decision will also address Respondent's request for a protective order. Respondent's 12(b)(6) Motion to Dismiss will be address once the OPC has had an opportunity to file a response and the appropriate request to submit for decision has been filed.

The Court has reviewed the pleadings and determined oral argument is not necessary and will not assist the Court in rendering a decision. The issues are authoritatively resolved by clear law. The Court, now being fully advised rules as follows:

ARGUMENTS

The OPC contends that Respondent has not responded appropriately and within the Rules of Civil Procedure to discovery requests sent to her. The OPC moves the court to strike Respondent's memorandum response to the discovery requests and order her to r appropriately and within the Rules of Civil Procedure.

Respondent contends that this Court lacks jurisdiction to rule on the matters requested by the OPC. Furthermore, that the information requested by the OPC is privileged and the Court should grant a protective order barring the production of any information requested.

DISCUSSION

Rule 37, provides that a party may, upon reasonable notice to other parties in a case, apply for an order compelling discovery. The Rule also states that the motion "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action". The OPC did not submit a certification with its motion and Respondent has not raised this issue in her opposition. However, it seems apparent from the parties' memoranda and exhibits, including those related to the Respondent's Motion for TRO, Preliminary Injunction and ADR filed in federal court, that an attempt to confer would not have been fruitful.

The Rules of Civil Procedure provide clear guidelines for parties in civil cases to follow when responding to discovery requests from an opposing party. The OPC has sent to the Respondent Rule 33 Interrogatories,

Rule 34 Request for Production of Documents and Rule 36 Requests for Admissions. Instead of answering the requests in the manner outlined by the Rules, Respondent made a single statement, global denial stating "each and every single admission, interrogatory, or production request submitted to this attorney is denied based upon the following facts and law", and submitted a memorandum wherein she presented again various jurisdiction arguments and other issues she has previously raised in this case.

The Court agrees that the response filed by the Respondent to the discovery requests is entirely insufficient under the relevant Rules, is unresponsive, immaterial, and redundant of other filings by the Respondent. The Respondent's response does not comply with the relevant Rules which requires the Respondent to answer separately, fully and under oath each request unless there is an objection, in which case, the Respondent must state those grounds specifically. The Respondent's response is unresponsive and immaterial in that she raises arguments she has previously presented to the Court, that have been denied by the Court and that do not address what is material to the discovery request.These arguments are redundant and have been ruled on by the Court. It would appear, considering the number of motions to stay filed by Respondent that she wishes to delay this case.

Regarding Respondent's request for a protective order, she has failed to articulate with specificity what information should be protected and why. A blanket, general statement that any information requested in discovery should be protected is insufficient for the

Court to determine whether the request is proper. Furthermore, it appears that the Respondent reargues again her contention that this Court lacks jurisdiction in this matter and therefore cannot make any orders including those related to discovery requests. The Court has previously denied this request.

ORDER

IT IS HEREBY ORDERED, that the OPC's Motion to Compel and Motion to Strike be and hereby are granted. The Respondent is hereby ordered to respond to the discovery requests previously served on her by the OPC within 10 days of the date of this Memorandum Ruling. My clerk will contact the parties by telephone to inform them of the Court's ruling and also send a hard copy of the ruling by mail. The Respondent's Motion for a Protective Order be and hereby is denied. The OPC has requested expenses and attorney's fees. Rule 37(a)(4) requires the Court to grant the parties an opportunity for a hearing prior to making any orders pertaining to fees and expenses. The OPC may submit a request for fees with supporting affidavits. The Respondent is granted 10 days after being served with the request and affidavits to submit a written response and request a hearing.

Counsel for OPC is designated to prepare an appropriate order consistent with the Court's ruling.

/s/ Judge Vernice Trease
(certified copy)

Case No. 2:09-CV-695-TC

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

SUSAN ROSE,
Plaintiff,
vs.
UTAH STATE; UTAH STATE BAR; BILLY WALKER; CAROLYN COX; BARBARA TOWNSEND; ARTHUR BERGER; JOYCE SMITH; and other JOHN AND JANE DOES as yet to be identified, named jointly and severally, officially and personally,
Defendants.

Judge Tena Campbell

ORDER AND MEMORANDUM DECISION

Plaintiff Susan Rose, currently an attorney admitted to practice in Utah, is in the midst of ongoing disciplinary proceedings prosecuted by the Utah State Bar against her in a Utah state court. Ms. Rose has since filed suit in this court against the State of Utah,[1] the Utah State Bar and three of its officials, and two attorneys who filed complaints with the Bar against Ms. Rose. This matter comes before the court on various motions to dismiss and for summary judgment.[2] For the reasons

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[1] Ms. Rose confusingly refers to the State of Utah as "Utah State," which in local parlance is a term for the educational institution called Utah State University.

[2] The court finds that oral argument will not materially aid the court in its analysis, so the court's decision is based on the briefs.

set forth below, the court dismisses all of the Defendants on various grounds, including Eleventh Amendment immunity, the Younger abstention doctrine, and failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[3]

BACKGROUND

On December 10, 2007, the Utah State Bar filed a complaint against Ms. Rose in Utah's Third Judicial District Court. The State Bar's complaint charges Ms. Rose with twelve counts of violating Utah's Rules of Professional Conduct for attorneys and seeks disciplinary sanctions against her. The complaint's allegations involve Ms. Rose's conduct in representing clients in two cases, one case in federal court and the other in state court.

The State Bar filed the complaint against Ms. Rose as one step in its disciplinary process. But three events preceded filing the complaint. First, an informal complaint was filed against Ms. Rose in the State Bar's Office of Professional Conduct. Then a screening panel of the State Bar's Panel of Ethics and Discipline Committee (EDC) held a hearing concerning the informal complaint. After the hearing, the screening panel recommended that a formal complaint against Ms. Rose be filed in district court. That was done by the Utah State Bar in December 2007, when Barbara Townsend, Assistant Counsel to the Office of Professional Conduct (OPC) of the Utah State Bar, filed a disciplinary complaint in Third Judicial District Court

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[3] This ruling moots all other outstanding motions.

for the State of Utah. The complaint was filed "on behalf of the Utah State Bar, Office of Professional Conduct as directed by the Ethics and Discipline Committee of the Utah Supreme Court." (Compl. In the Matter of the Discipline of Susan Rose, #07985, Civil No. 070917445, at 25 (attached as Ex. A to Utah State Bar Defs.' Mem. Supp. Mot. Dismiss (Docket No. 7)).)

The action in state court is ongoing. Ultimately, the state district court adjudicating the complaint against Ms. Rose will conduct a two-phase bench trial. The state court will first try the merits of the complaint and then hold a trial on sanctions, if any. Ms. Rose or the State Bar may appeal the district court's rulings to the Utah Supreme Court. Apparently a trial on the merits has not yet occurred.

In 2008, Ms. Rose filed a complaint in this court targeting the state disciplinary proceedings against her. In that complaint, she named as defendants the Utah State Bar, the Bar's Office of Professional Conduct, the Utah Supreme Court's Ethics and Discipline Committee, Barbara Townsend and Arthur Berger. She sought a declaration that the State Bar's disciplinary rules and procedures violate the First, Fifth, and Fourteenth Amendments of the United States Constitution, and an injunction barring the named defendants from continuing to pursue the state court disciplinary action against her.

On October 1, 2008, this court dismissed Ms. Rose's federal action without prejudice on the basis that the court should abstain from exercising jurisdiction over the case because it involved an ongoing state judicial proceeding in which Ms. Rose was able to have her

constitutional challenges adequately heard. See Order & Mem. Decision (Docket No. 52) in Rose v. Utah State Bar, Case No. 2;08-CV-592 (D. Utah).)

Despite the earlier dismissal, Ms. Rose now attempts to revive her claim through a second complaint (the one at issue here) that makes similar allegations and expands the causes of action and list of defendants.

She continues her suit against the Utah State Bar, its officials Ms. Townsend (the attorney prosecuting the disciplinary action in state court) and Mr. Berger (Chair of the Ethics and Discipline Committee for the Utah Supreme Court). She also names Billy Walker, senior counsel for the Bar. All are named in their individual and official capacities. She has added the State of Utah as a defendant,[4] and she has added two private attorneys--Carolyn Cox and Joyce Smith-who were opposing counsel in cases involving Ms. Rose and who

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[4] There is confusion about whether the State Court Administrator was named as a party here. See Utah Court Administrator's Mem. Supp. Mot. Dismiss (Docket No. 48) at 2 ("This defendant does not know if it is a defendant in the litigation. As explained below, no cause of action appears in the complaint and petition which identifies wrongdoing on the part of this party. This party is not even named in the caption of the complaint. [But] general counsel for the Utah Court Administrator's office [was served with a summons]"). Ms. Rose responded in her "Notice to the Court" that the "office of Utah's State Court Administrator is Not a Party at this time." (Docket No. 57 at 1.) Her explanation; "In order to ensure that Utah State's judicial branch was served, in [sic] behalf of the State of Utah, the State Court administrator and the Attorney General's office were both served in [sic] behalf of Utah State." Id. Given all of the factors discussed in those two papers, the court concludes that the Utah Court Administrator is not a party and so the motion seeking dismissal of a non-party (Docket No. 47) is DENIED AS MOOT.

filed informal complaints with the Bar concerning Ms. Rose's conduct in those cases.

She continues to seek declaratory and injunctive relief, claiming that the Defendants have violated her constitutional rights to free speech, freedom to petition, due process, equal protection, and freedom from illegal takings. She contends that her case is not brought under 42 U.S.C. § 1983, but rather is brought under the Supremacy Clause. She has added a claim for monetary damages, further alleges breach of contract against all Defendants, and adds state law causes of action against the individual Defendants for conversion, conspiracy, and intentional infliction of emotional distress.

ANALYSIS

Legal Standard for Rule 12(b)(6) Motions to Dismiss

When reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, the court must presume the truth of all well-pleaded facts in the complaint, but need not consider conclusory allegations. Tal v. Hogan, 453 F.3d 1244,1252 (2006), cert. denied, 127 S. Ct.1334 (2007); Mitchell y. King, 537 F.2d 385, 386 (10th Cir.1976). Conclusory allegations are allegations that "do not allege the factual basis" for the claim. Brown v. Zavaras, 63 F.3d 967, 972 (10th Cir.1995). See also Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir.1991) ("conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based") (emphasis added). The court is not bound by a complaint's legal conclusions, deductions and opinions couched as facts. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555

(2007). And although all reasonable inferences must be drawn in the non-moving party's favor, Tal, 453 F.3d at 1252, a complaint will only survive a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, quoted in Ridge at Red Hawk LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007). Stating a claim under Rule 8 "demands more than an unadorned, thedefendant-unlawfully-harmed-me accusation. A pleading that offers `labels and conclusions' or `a formulaic recitation of the elements of a cause of action will not do."' Ashcroft v, Iqbal,129 S. Ct.1937,1949 (2009) (quoting Twombly, 550 U.S. at 555).

Eleventh Amendment Immunity

"Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity." Green v. Mansour, 474 U.S. 64, 68 (1985).

Here, the State of Utah has not consented to suit in federal court.[5] Because it is immune from suit under the

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[5] Nothing in the record shows that Utah has waived its Eleventh Amendment immunity or that Congress abrogated such immunity concerning civil rights claims, "Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to our jurisdiction." Tarboner County Rural Water Dist. No. 2 v. Grand River Dam Authority, 577 F.3d 1255, 1258 (10th Cir. 2009). Such circumstances simply do not exist here. And to the extent that the State of Utah may have waived immunity for contract

Eleventh Amendment, the court must dismiss the State as a matter of law. See, e.g., Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989); V-1 Oil Co. v. Utah State Dep't of Public Safety, 131 F.3d 1415, 1420 (10th Cir.1997). "Eleventh Amendment immunity applies regardless of whether a plaintiff seeks declaratory or injunctive relief, or money damages." Steadfast Ins. Co. v. Agricultural Ins. Co., 507 F.3d 1250,1252 (10th Cir. 2007); see also V-1 Oil Co., 131 F.3d at 1420 (same).[6]

Moreover, the "arm-of-the-state doctrine bestows immunity on entities created by state governments that operate as alter egos or instrumentalities of the states." Watson v. University of Utah Med. Ctr., 75 F.3d 569, 574 (10th Cir.1996). To determine arm-of-the- state status, the court must look to particular state laws characterizing the entity. Sturdevant v. Paulsen, 218 F.3d 1160, 1164 (10th Cir. 2000).

Article VIII, Section 4 of the Utah Constitution gives the Utah Supreme Court the power to govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to

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claims, that issue is moot because the court must abstain from addressing that issue.

[6] There is one exception to Eleventh Amendment immunity. Under the Ex Parte Young exception, state officials named in their official capacities are hot immune from claims seeking prospective injunctive relief. Green, 474 U.S. at 68; Ruiz, 299 F.3d at 1180; V-1 Oil Co., 131 F.3d at 1421. But because the court concludes that it must abstain from ruling on Ms. Rose's claims alleging problems with the disciplinary proceeding in state court, the court need not address, much less apply, the exception. It is not relevant in light of the court's non-discretionary abstention.

practice law. See also Utah State Bar v. Summerhayes & Hayden, Public Adjusters, 905 P.2d 867, 870 (Utah 1995) (holding that it "has the exclusive authority to regulate the practice of law in Utah. This authority includes the power to determine what constitutes the practice of law and to promulgate rules to control and regulate that practice.") (internal citations omitted).

To accomplish its constitutional duty, the Utah Supreme Court promulgated the Supreme Court Rules of Professional Practice, which include the "Utah Rules of Professional Conduct" (Chapter 13 in the Judicial Council Rules of Judicial Administration) and the "Utah Rules Governing the Utah State Bar" (Chapter 14 in the Judicial Council Rules) (collectively, the "Rules"). Ultimate enforcement of the Rules rests with the Utah Supreme Court, but prosecution of Rules violations is delegated to the Utah State Bar, See Rule 14-102 ("Under the power vested to it by the Constitution of Utah, the Supreme Court hereby authorizes and designates the Bar to administer rules and regulations which govern the practice of law in Utah."). Rule 14-102 specifically authorizes the State Bar to "assist the Court" in carrying out its constitutional authority. The Bar's delegated duties include the responsibility "to provide for the ... discipline of persons practicing law." Rule 14-102(b)(4); see also Rule 14-202 (listing purposes of the Bar, including aiding the courts in administering justice and providing regulation and discipline of Utah attorneys).

Under the Rules, the Ethics and Discipline Committee is a committee of the Utah Supreme Court. Rule 14-503(a). It is not a branch or function of the Utah State Bar, but a separate entity whose members are directly

appointed by and work under the Utah Supreme Court. See id.

The court concludes that the Utah State Bar is an arm of the State because it is acting as an alter ego of the Utah Supreme Court.[7] Accordingly, it too is immune from suit. See Sturdevant v. Paulsen, 218 F.3d 1160, 1162 (10th Cir. 2000) (entity acting as alter ego of state (rather than political subdivision of state) is "arm of state" and so immune from suit under Eleventh Amendment). And each of the Utah State Bar officials who have been named in their official capacities are also immune. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 113 (1984); Ruiz v. McDonnell, 299 F.3d 1173, 1180 (10th Cir. 2002); V-1 Oil Co., 131 F.3d at 1420-21.

Accordingly, under the Eleventh Amendment immunity doctrine, the court dismisses all of Ms. Rose's claims against the State of Utah, the Utah State Bar, Billy Walker in his official capacity, Barbara Townsend in her official capacity, and Arthur Berger in his official capacity. See, e.g., V-1 Oil Co., 131 F.3d at 1422 (dismissing claims seeking retroactive monetary reimbursement and declaration that state officers violated federal law in the past).

Abstention under Younger v. Harris

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[7] Indeed, Ms. Rose, in her Verified Complaint, alleges that the Utah State Bar is an arm of the State. See Verified Compl. Pars. 165, 203(f).)

The crux of this action is that Ms. Rose wants the ongoing State Bar disciplinary action against her halted. This type of case is controlled by the United States Supreme Court's opinion in Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982). In Middlesex, the Court upheld a federal district court's dismissal, on abstention grounds, of a constitutional challenge to New Jersey's attorney disciplinary rules brought by an attorney in an ongoing disciplinary proceeding. See id. at 437. The Middlesex Court began its analysis by explaining the abstention doctrine as follows:

> Younger v. Harris, [401 U.S. 37 (1971)], and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. The policies underlying Younger abstention have been frequently reiterated by this Court. The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights.

457 U.S. at 431 (citations omitted).

The Middlesex Court identified three relevant inquiries to determine the propriety of the district court's abstention:

> The question in this case is threefold; first, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id. at 431. The Court answered all three questions in the affirmative. See id. at 432-437. Accordingly, the Court found that the district court correctly abstained, and that dismissal was proper. See id. at 437.

The Middlesex Court's reasoning is squarely on point here. First, as in New Jersey, the Utah Supreme Court is empowered to govern the practice of law by the state constitution. See Utah Const., art. VIII, § 4. Moreover, there is no question that attorney disciplinary proceedings in Utah are judicial in nature: the disciplinary complaint against Ms. Rose is proceeding in Utah state district court, and any appeal will be heard by the Utah Supreme Court. It is obvious, then, that there is an ongoing state judicial proceeding involved here. Second, Middlesex makes clear that overseeing professional conduct of attorneys is an important state interest. See id. at 434-35. Finally, it is presumed that the Utah state court proceedings are an adequate forum for Ms. Rose to raise her constitutional and state law challenges. See id. at 431, 435. The presumption is particularly apt here, since the state district court is competent to hear such challenges, and the Utah Supreme Court has the power to review the district court's rulings. Moreover, Ms. Rose does not allege facts that demonstrate that the court proceedings are inadequate, such as a rule against bringing a

constitutional challenge during the disciplinary proceedings. [8] In sum, all of the criteria for abstention are met here. See also Landrith v. Hazlett,170 Fed. Appx. 29, 31 (10th Cir. 2006) (upholding abstention in case challenging constitutionality of ongoing Kansas state attorney disciplinary action).

There are two circumstances in which a court may elect to review an ongoing state judicial proceeding. First, a court may refuse to abstain if the state court proceedings are "flagrantly and patently" unconstitutional. Middlesex, 457 U.S. at 437. Second, a court may decline to abstain if there are exceptional circumstances, such as bad faith or harassment, involved in the state process. See id. at 429, 437. Ms. Rose does not claim that the State Bar has filed its complaint against her in bad faith or as a form of harassment.

On the question of constitutionality, Ms. Rose argues that the federal courts have exclusive jurisdiction to discipline her for any actions she took in representing clients in a federal court and that a state court may not review those actions. In effect, Ms. Rose argues that states are preempted (by what she calls the "Constitutional Design" under the Supremacy Clause) from disciplining attorneys for their conduct in federal court. Ms. Rose, however, does not provide any authority directly supporting this proposition, and the

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[8] She alleges that the Utah Supreme Court disciplinary rules do not allow her to bring her claims. But the question is whether she has the opportunity to bring her federal and state claims in the Third District Court for the State of Utah. There she does have such an opportunity. Accordingly, her argument fails.

relevant cases the court reviewed held the opposite. For example, in Cantenella v. California, 404 F.3d 1106, 1110 (9th Cir. 2005), the court rejected an attorney's "unsupported contention that states have no interest in regulating attorney misconduct occurring in federal court." The court reasoned that:

"States traditionally have exercised extensive control over the professional conduct of attorneys," as each state has "an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." This extensive control has traditionally included the power to discipline attorneys for misconduct regardless of the jurisdiction 1n which it occurs.

The States' long-arm regulatory authority over the attorneys they license derives in part from the nature of disciplinary proceedings. They are "neither civil nor criminal, but an investigation in to the conduct of the lawyer-respondent." . . . Because the relevant state interest is an attorney's integrity and continuing fitness to practice, rather than the integrity of the particular courtroom in which misconduct occurs, the venue is irrelevant to the reach of the state disciplinary authority.

Accordingly, we have specifically held that the Supreme Court of California has jurisdiction to discipline members of the State Bar of California who practice even exclusively in federal court or before federal agencies. In rejecting the argument that California's regulatory authority is preempted by federal law, we noted that the applicable federal regulations condition federal bar membership on an

attorney's good standing as a member of a state bar and thereby invite or at least accommodate overlapping state regulation

Id. (citations omitted). Cantenella's reasoning is persuasive here.

In sum, the court is not convinced by Ms. Rose's argument that the State Bar may not seek to discipline her for alleged misconduct in a federal case. Nor does anything else in Ms. Rose's verified complaint lead to the conclusion that any other aspect of the State Bar's proceedings against her are flagrantly or patently unconstitutional.

When the criteria for abstention are met, as they are here, abstention is non-discretionary. See Crown Point 1 LLC v. Intermountain Rural Elec. Ass'n 319 F.3d 1211, 1215 (10th Cir. 2003). Accordingly, the court abstains from reaching all claims raised against the State of Utah, the Utah State Bar, and the Bar officials in their individual and official capacities.

Federal Civil Rights Claims Under 42 U.S.C. §,1983

State of Utah Utah State Bar and State Officials

Alternatively, all of Ms. Rose's § 1983 claims against the State entities and officials fail as a matter of law because a State, any arm-of-the-state, and state officials sued in their official capacities are not "persons" under

the federal civil rights statute. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71(1989).[9]

Private Individual Defendants Cox and Smith

To state a claim for relief under § 1983, Ms. Rose must allege that she was deprived of a right secured by the United States Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999) ("the under-color-of-state- law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful") (internal quotation marks and citations omitted). Ms. Rose's civil rights claims against Ms. Cox and Ms. Smith do not satisfy the state action requirement.

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[9] Ms. Rose adamantly states that she is not bringing any claims under 42 U.S.C. § 1983. Instead, she claims she is relying on the Supremacy Clause to support her causes of action, and cites to *Wilderness Soc'y v. Kane County*, _F.3d _, No. 08-4090, 2009 WL 2777712 (10th Cir. Aug. 31, 2009) to bolster her argument. Wilderness Society does hot support her claim. In that case, the court held that a private individual may bring an action for declaratory or injunctive relief under the Supremacy Clause to determine whether a particular state law is pre-empted by a federal statute, even if the federal statute does not create a private right of action. Here, Ms. Rose does not cite to any federal statute that remotely suggests that federal courts have exclusive jurisdiction to regulate the practice of law in the State of Utah (or any other state for that matter). Moreover, nothing in Wilderness Society suggests that she would have a cause of action against a private individual under the Supremacy Clause. Her reliance on Wilderness Societ is misplaced.

Because Ms. Cox and Ms. Smith are not state officials, the issue is whether their "allegedly unconstitutional conduct is fairly attributable to the State." Id. at 50. According to Ms. Rose's Verified Complaint, Ms. Cox and Ms. Smith have been added to this suit because they filed informal complaints with the Utah State Bar against Ms. Rose. Ms. Smith and Ms. Cox (as private attorneys) are not state actors. Under certain circumstances, however, private actors may act "under color of state law" and so be liable under § 1983. Crabtree v. Muchmore, 904 F.2d 1475, 1480 (10th Cir.1990) (citing Lugar v._Edmondson Oil Co., 457 U.S. 922 (1982)). That is, if the private party is found to jointly participate with a state official in a conspiracy to violate a constitutional right, then the private party may be liable under § 1983. Lugar v. Edmondson Oil Co., 457 U.S. 922, 931, 937 (1982).

> Conspiracy necessarily involves a plan to accomplish a common goal, preconceived and agreed upon by the alleged conspirators; concerted action as used in this context requires only willful participation in a joint activity. The requirements however for pleading "state action" under this "joint participation" theory are no less stringent than the requirements for pleading a conspiracy.

Crabtree, 904 F.2d at 1481.

Ms. Rose generally avers conspiracy without providing any supporting facts. See Verified Compl. Par. 11("The Defendants are working in concert with, conspiring [with] each other."); Par. 52 ("Defendant Walker, working with the bar complainants used their bar complaints, and filed informal complaints ... on [sic] this

attorney. . .."); Par. 53 (Defendant Walker and Townsend (staff of OPC and secretary to the EDC) and Defendant Berger (who is over the ethics and discipline screening panels) working in concert with the bar complainants, held screening panel hearings."); Par. 54 ("A public BAR COMPLAINT was filed in 3rd District Court, Dec. 12, 2008, supervised by Defendant Walker, drafted and signed by Defendant Townsend, and signed, approved, and authorized by Defendant Berger, based upon the cooperation of bar complainants Cox and Smith."); Par. 55 ("By the terms of RLDD rule 14-510,[10] defendants had to conspire with each other, work in concert with each other to claim their actions were for the public purpose of State regulation of attorneys."); Par.58 ("The Defendants sought for and obtained the Utah State Bar Association's support and funding of their artifice, all working together to injure this attorney. . . ."); Par. 67(c) (alleging that Ms. Cox was "cooperating and conspiring with" the other Defendants); Par. 67(d) (alleging that Ms. Smith was "cooperating and conspiring and acting in concert with" the other Defendants).) Such vague and conclusory allegations are not sufficient to survive a motion to dismiss. See e.g, Crabtree, 904 F.2d at 1480-81 ("mere conclusory allegations with no supporting factual averments are insufficient" to allege state action conspiracy); Benavidez v. Gunnell, 722 F.2d 615, 618 (10th Cir.1983) (conclusory allegations of conspiracy not enough to establish conspiracy between private parties and public officials).

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[10] Rule 14-510 sets forth the process for filing informal complaints of unprofessional conduct and the procedures for following up on such complaints.

The acts that are adequately alleged[11] -i.e., independently filing informal complaints against Ms. Rose with the Utah State Bar do not fall within the definition of state action. See e.g., Scott v. Hern, 216 F.3d 897, 906 (10th Cir. 2000) ("A private individual does not engage in state action simply by availing herself of a state procedure."); Crabtree, 904 F.2d at 1481-82 ("The requisite joint participation envisioned by the Supreme Court goes beyond the mere use of the state court system by private litigants in the course of an ordinary lawsuit."); Benavidez, 722 F.2d at 618 ("The mere furnishing of information to police officers does not constitute joint action under color of state law which renders a private citizen liable under §§ 1983 or 1985."); Hoai v. Vo, 935 F.2d 308, 313 (D.C. Cir.1991) ("It is well established that mere recourse to state or local court procedures does not by itself constitute `joint activity' with the state sufficient to subject a private party to liability under section 1983."); Read v. Klein, 1 Fed. Appx. 866, 871 (10th Cir. 2001) ("[A] private party's `mere invocation of state legal procedures' does not constitute joint participation and thus is not state action.") (internal citation omitted). Accordingly, all civil rights claims against Ms. Cox and Ms. Smith (the First, Second, Third, and Fourth Claims) are hereby dismissed.

Takings Claims Are Not Ripe

The disciplinary action brought against Ms. Rose does not specify the relief sought by the Utah State Bar. That is, it does not specifically request that she be

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[11] (See Verified Compl. Par. 48-51.)

disbarred. Moreover, the proceedings are ongoing and Ms. Rose continues to hold her license and right to practice law in the State of Utah. Her characterization of her injuries as losses does not withstand scrutiny. The issues for takings (and conversión for that matter) are, at a minimum, not ripe.

State Law Claims

Breach of Contract

The court has abstained from reaching this claim against the State of Utah, the State Bar, and the State Bar officials. As for the remaining individual defendants, Ms. Rose has not alleged that a contract exists between them. She focuses on what she perceives to be a contract between herself and the Utah State Bar, based on her membership in the Bar. Such a contract has no connection to the individual defendants (Mr. Walker, Mr. Berger, Ms. Townsend, Ms. Cox, and Ms. Smith). Accordingly, this claim is dismissed against those individual Defendants with prejudice.

Intentional Infliction of Emotional Distress

Ms. Rose brings this cause of action against the individual Defendants. But she has not pleaded the necessary elements of the claim. To succeed on a claim for intentional infliction of emotional distress, a plaintiff must prove that "(i) the defendant's conduct is outrageous and intolerable in that it offend[ed] ... generally accepted standards of decency and morality; (ii) defendant intend[ed] to cause, or act[ed] in reckless disregard of the likelihood of causing, emotional distress; (iii) plaintiff suffer[ed] severe emotional

distress; and (iv) defendant's conduct proximately cans[ed] the emotional distress."

Hatch v. Davis, 102 P.3d 774, 787 (Utah Ct. App. 2004).

According to Ms. Rose's complaint, Ms. Cox and Ms. Smith each filed an informal complaint against her with the Utah State Bar. Although it is not altogether clear from the allegations, she seems to further contend that Ms. Cox and Ms. Smith cooperated with the Bar officials investigating the complaints. But this type of conduct, which is anticipated and provided for by the Utah Supreme Court rules, is far from the conduct necessary to establish the tort of intentional infliction of emotional distress. See, e.g., Gulbraa v. Corporation of the President of the Church of Jesus Christ of Latter-day Saints 159 P.3d 392, 396 (Utah Ct. App. 2007) (requiring a showing of actions that would be "considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality") (internal citation omitted).

Accordingly, Ms. Rose's claims of intentional infliction of emotional distress are dismissed with prejudice.

Conversion

Under Utah law, to sustain an action for conversion, a plaintiff must prove "an act of wilful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession." Phillips v. Utah State Credit Union, 811 P.2d 174, 179 (Utah 1991) (quotation omitted). Here, Ms. Rose's claims for conversion fail because she has not alleged that she has been deprived of any property.

She still has her professional license, education and work experience, her client's contracts, and her right to contract (assuming these are chattel that would be covered by a claim for conversion). Accordingly, the court dismisses Ms. Rose's seventh, eighth, and ninth claims with prejudice.

Conspiracy

The court finds that this claim is subsumed within Ms. Rose's civil rights claims. Accordingly, it fails for the same reasons that the civil rights claims fail.

ORDER

For the reasons set forth above, the court GRANTS the Utah State Bar Defendants' Motion to Dismiss (Docket No. 6), and the State of Utah's Motion to Dismiss (Docket No. 66). The court GRANTS IN PART AND DENIES IN PART Defendant Carolyn Cox's Motion to Dismiss (Docket No. 78) (specifically, Ms. Cox is dismissed as a Defendant but the court declines to enjoin Ms. Rose from filing lawsuits against Ms. Cox). All other remaining motions (Docket Nos. 47, 51, 70, 93, and 135) are DENIED AS MOOT.

The court further orders that Susan Rose's Verified Complaint For Damages (Docket No. 1) is DISMISSED against ALL DEFENDANTS; her Verified Petition for an Extraordinary Writ (Docket No. 3) is DENIED; her Petition for a Three Judge Panel (Docket No. 4) is DENIED; and her Verified Petition for a Temporary Restraining Order & Preliminary Injunction (Docket No. 2) is DENIED.

DATED this 16th day of December, 2009.

/s Tena Campbell
(PACER Copy)

Civil No. 2:00-CV-584BSJ

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DR STEVEN MACARTHUR et al.,
Plaintiffs,
vs.
SAN JUAN COUNTY, et al., Defendants.

Judge Bruce S. Jenkins

ORDER RE; PLAINTIFFS' MOTION FOR LEAVE TO FILE APPLICATION FOR AN IMMEDIATE SPECIAL WRIT (23 U.S.C. § 1651)

Plaintiffs' counsel's motion for permission to ftle a motion pursuant to 28 U.S.C. Sec. 1651 for issuance of an immediate special writ in aid of this court's jurisdiction, and related relief, filed February 17, 2009 (dkt, no, 1025), is DENIED.

Absent a showing of bad faith, harassment, or some other extraordinary circumstance, the propriety of a State bar proceeding before a State tribunal is not as appropriate subject for federal court interference as to subject, scope and evidence. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431-37 (1982), Such a proceeding is not the same as a federal disciplinary proceeding before a fedcral

tribunal. While a federal disciplinary mechanism exists concerning the conduct of members of the bar of this court, see DUCivR 83-1.5.1 through 83-1.5.8, that process has not been invoked in the context of this litigation.

DATED this 10th day of March, 2009.

/s Judge Bruce S. Jenkins

(PACER copy)

Case No. 20090268-SC

IN THE SUPREME COURT OF THE STATE OF UTAH

Susan Rose,
Petitioner,
v.
The Honorable Vernice Trease,
Respondent.

ORDER

This matter is before the Court on Petition for Extraordinary Relief seeking immediate review of pending attorney disciplinary proceedings. The petition is denied.

FILED 5/14/2009 s/ Matthew B. Durrant
Associate Chief Justice

(certified copy)

Case No. 2:08-CV-592 TC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SUSAN ROSE, Plaintiff,

vs.

UTAH STATE BAR, et al., Defendants.

October 1, 2008, Decided
October 2, 2008, Filed

TENA CAMPBELL, Chief District Judge.

ORDER and MEMORANDUM DECISION

Plaintiff **Susan Rose** seeks to enjoin the Utah State Bar (the "State Bar") and others from continuing an attorney disciplinary action against her. That action is currently proceeding in a Utah state district court. Ms. Rose contends that the State Bar's disciplinary rules and procedures violate the First, Fifth, and Fourteenth Amendments of the United States Constitution. Defendants have moved to dismiss this action, arguing that the court should abstain from litigation seeking to enjoin an ongoing state action.

Abstention is clearly warranted in this case. Attorney regulation is an undeniably important state interest, and Ms. Rose can bring her constitutional challenges to the state court hearing the ethics complaint against her. On that basis, Defendants' motion to dismiss is GRANTED without prejudice.

BACKGROUND

Ms. Rose is an attorney admitted to practice in Utah. On December 10, 2007, the State Bar filed a complaint against Ms. Rose in Utah's Third Judicial District Court. The State Bar's complaint charges Ms. Rose with twelve counts of violating Utah's Rules of Professional Conduct for attorneys and seeks disciplinary sanctions against her. The complaint's allegations involve Ms. Rose's conduct in representing clients in two cases, one case in federal court and the other in state court.

The State Bar filed the complaint against Ms. Rose as one step in its disciplinary process. There were three steps before filing the complaint. First, an informal complaint was filed against Ms. Rose in the State Bar's Office of Professional Conduct. A screening panel of the State Bar's Panel of Ethics and Discipline Committee then conducted a hearing into the informal complaint. After the hearing, the screening panel recommended that a formal complaint against Ms. Rose should be filed in district court.

Under the State Bar's procedure for attorney discipline, the state district court adjudicating the complaint against Ms. Rose will conduct a two-phase bench trial. The court will first try the merits of the complaint and then hold a trial on sanctions, if any. Ms. Rose or the State Bar may appeal the district court's rulings to the Utah Supreme Court. It is not clear whether Ms. Rose has answered the State Bar's complaint as of the date of this Order, but in any event, a trial on the merits has not yet occurred.

Ms. Rose filed a complaint in this court on August 7, 2008, and amended her complaint on August 13, 2008.

The amended complaint names as defendants the State Bar, Barbara Townsend, Arthur Berger, and the State Bar's Office of Professional Conduct and Ethics and Discipline Committee (collectively, the "Defendants"). In her amended complaint, Ms. Rose alleges -- and seeks a declaration -- that the State Bar's disciplinary rules and procedures violate the First, Fifth, and Fourteenth Amendments of the United States Constitution in various ways. The court will not describe each of Ms. Rose's specific claims, but in general terms, Ms. Rose maintains that nearly every step of the process against her is constitutionally infirm. Based on these alleged constitutional violations, Ms. Rose seeks an injunction barring the Defendants from continuing to pursue the state court disciplinary action against her.

On September 3, 2008, the Defendants filed a motion to dismiss Ms. Rose's amended complaint. Defendants contend, among other things, that the court should abstain from exercising jurisdiction over this case because it involves an ongoing state judicial proceeding in which Ms. Rose is able to have her constitutional challenges adequately heard. For the reasons below, the court agrees with Defendants and accordingly GRANTS their motion to dismiss without prejudice. This ruling renders moot all other outstanding motions, as the court has declined jurisdiction to decide them.

ANALYSIS

The crux of this action is that Ms. Rose wants an ongoing State Bar disciplinary action against her halted. This type of case appears to be directly controlled by the United States Supreme Court's opinion in *Middlesex County Ethics Comm. v. Garden*

State Bar Ass'n, 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982). In *Middlesex*, the Court upheld a federal district court's dismissal, on abstention grounds, of a constitutional challenge to New Jersey's attorney disciplinary rules brought by an attorney in an ongoing disciplinary proceeding. *See id.* at 437. The *Middlesex* Court began its analysis by explaining the abstention doctrine as follows:

> *Younger v. Harris*, [401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)], and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. The policies underlying *Younger* abstention have been frequently reiterated by this Court. The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights.

457 U.S. at 431 (citations omitted).

The *Middlesex* Court identified three relevant inquiries to determine the propriety of the district court's abstention:

> The question in this case is threefold: first, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id. at 431. The Court answered all three questions in the affirmative. *See id.* at 432-437. Accordingly, the Court found that the district court correctly abstained, and that dismissal was proper. *See id.* at 437.

The *Middlesex* Court's reasoning is squarely on point here. First, as in New Jersey, the Utah Supreme Court is empowered to govern the practice of law by the state constitution. *See* Utah Const., art. VIII, § 4. Moreover, there is no question that attorney disciplinary proceedings in Utah are judicial in nature: the disciplinary complaint against Ms. Rose is proceeding in Utah state district court, and any appeal will be heard by the Utah Supreme Court. It is obvious, then, that there is an ongoing state judicial proceeding involved here. Second, *Middlesex* makes clear that overseeing professional conduct of attorneys is an important state interest. *See id.* at 434-35. Finally, it is presumed that the Utah state court proceedings are an adequate forum for Ms. Rose to raise her constitutional challenges. *See id.* at 431, 435. The presumption is particularly apt here, since the state district court is competent to hear such challenges, and the Utah Supreme Court has the power to review the district court's rulings. Moreover, Ms. Rose does not allege facts that demonstrate that the proceedings are

inadequate, such as a rule against bringing a constitutional challenge during the disciplinary proceedings. In sum, all of the criteria for abstention are met here. *See also Landrith v. Hazlett*, 170 Fed. Appx. 29, 31 (10th Cir. 2006) (upholding abstention in case challenging constitutionality of ongoing Kansas state attorney disciplinary action).

There are two circumstances in which a court may elect to review an ongoing state judicial proceeding. First, a court may refuse to abstain if the state court proceedings are "flagrantly and patently" unconstitutional. *Middlesex*, 457 U.S. at 437. Second, a court may decline to abstain if there are exceptional circumstances, such as bad faith or harassment, involved in the state process. *See id.* at 429, 437. Ms. Rose does not argue that the State Bar has filed its complaint against her in bad faith or as a form of harassment.

On the question of constitutionality, Ms. Rose argues that the federal courts have exclusive jurisdiction to discipline her for any actions she took in representing clients in a federal court and that a state court may not review those actions. In effect, Ms. Rose argues that states are preempted from disciplining attorneys for their conduct in federal court. Ms. Rose, however, does not provide any authority directly supporting this proposition, and the relevant cases the court reviewed held the opposite. For example, in *Cantenella v. California*, 404 F.3d 1106, 1110 (9th Cir. 2005), the court rejected an attorney's "unsupported contention that states have no interest in regulating attorney misconduct occurring in federal court." The court reasoned that:

"States traditionally have exercised extensive control over the professional conduct of attorneys," as each state has "an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." This extensive control has traditionally included the power to discipline attorneys for misconduct regardless of the jurisdiction in which it occurs.

The States' long-arm regulatory authority over the attorneys they license derives in part from the nature of disciplinary proceedings. They are "neither civil nor criminal, but an investigation in to the conduct of the lawyer-respondent." . . . Because the relevant state interest is an attorney's integrity and continuing fitness to practice, rather than the integrity of the particular courtroom in which misconduct occurs, the venue is irrelevant to the reach of the state disciplinary authority.

Accordingly, we have specifically held that the Supreme Court of California has jurisdiction to discipline members of the State Bar of California who practice even exclusively in federal court or before federal agencies. In rejecting the argument that California's regulatory authority is preempted by federal law, we noted that the applicable federal regulations condition federal bar membership on an attorney's good standing as a member of a state bar and thereby invite or at least accommodate overlapping state regulation

Id. (citations omitted). *Cantenella's* reasoning is persuasive here.

As indirect authority, Ms. Rose cites *In re Landerman*, 7 F. Supp. 2d 1202 (D. Utah 1998), which states that the "Utah Supreme Court has no authority over the admission of attorneys to practice before this court or the discipline of members of the Bar of this court and their right to practice in this court." *Id.* at 1203. Ms. Rose reads *Landerman* as precluding states from disciplining attorneys for actions taken in federal court. But Ms. Rose misreads *Landerman*. Rather, *Landerman* establishes that the federal court is the sole judge of whether to allow an attorney to practice before it and whether to impose federal discipline against the attorney. *See id.* at 1203-04. In other words, a federal court is not bound by the decisions of a state court regarding attorney discipline and is not forced, for example, to disbar an attorney from federal practice if the attorney has been disbarred from state practice. *See id. Landerman* does not address whether a state may base a disciplinary action on an attorney's conduct in federal court.

The same reasoning applies to Ms. Rose's arguments based on Fed. R. Civ. P. 83 and DUCivR 83-1.5. That is, those rules govern the federal courts' regulation of attorney practice before them, but say nothing about the ability of the state to discipline attorneys relating to their federal practice. Simply put, *Landerman*, Rule 83, and Local Rule 83-1.5 do not apply here because the state is not attempting to impose federal sanctions on Ms. Rose.

In sum, the court is not convinced by Ms. Rose's argument that the State Bar may not seek to discipline

her for alleged misconduct in a federal case. Nor does anything else in Ms. Rose's amended complaint lead to the conclusion that any other aspect of the State Bar's proceedings against her are flagrantly or patently unconstitutional.

When the criteria for abstention are met, as they are here, abstention is non-discretionary. *See Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003). Ms. Rose seeks declarative and injunctive relief, not damages, making dismissal without prejudice proper. *See Landrith*, 170 Fed. Appx. at 31 and *Harrington v. Wilson*, 242 Fed. Appx. 514, 516 (10th Cir. 2007). Finally, as the court has declined to exercise jurisdiction over the case, the court will not address the merits of the Defendants' other arguments or rule on Ms. Rose's pending motions.

ORDER

For the reasons set forth above, Defendant's motion to dismiss (Dkt. No. 21) is GRANTED. All other motions are DENIED as moot. This action is dismissed without prejudice.

SO ORDERED this 1st day of October, 2008.

BY THE COURT:

/s/ Tena Campbell

TENA CAMPBELL

Chief District Judge

(PACER copy)

Civil No. 2:00-CV-584BSJ

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DR. STEVEN MACARTHUR, et al., Plaintiffs,

vs.

SAN JUAN COUNTY, et al., Defendants.

ORDER RE: PLAINTIFFS' "RULE 65 AND 25 U.S.C. 1651

APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PRELIMINARY OR PERMANENT INJUNCTION SHOULD NOT ISSUE"
(Fed. R. Civ. P. 65)

* * * * * * * * *

On June 11, 2008, plaintiff's Singer, Riggs and Dickson filed a motion for temporary restraining order and other extraordinary or equitable relief (dkt. no. 996), with respect to a proceeding now pending in state district court and involving plaintiffs' counsel and the Utah State Bar's Office of Professional Conduct,

Having reviewed the plaintiffs' motion and memorandum, it appears that plaintiffs' counsel misapprehends the nature of this court's May 12, 2008 bench ruling, now set forth in written form in a Memorandum Opinion and Order filed today. Nothing about the equitable relief granted by this court forecloses plaintiffs' counsel from presenting *any* argument in defense of her conduct in representing

these plaintiffs in this proceeding in the separate proceeding now pending before the state district court.

"All attorneys admitted to the bar of this court are subject to the disciplinary jurisdiction of this court, "DUCivR 83-1.5(h).

Be that as it may, the threatened injury alleged in the plaintiffs' moving papers that may result from the pending state court proceeding appears to be injury to plaintiffs' counsel *individually*, and not to the plaintiffs themselves. In the context of this case, plaintiffs Singer, Riggs and Dickson thus lack standing to seek preliminary injunctive relief as to the pending state court proceeding involving their counsel and the other non-parties named in the pending motion. The proper parties to a proceeding for such equitable or extraordinary relief are not before this court.

Consequently,

IT IS ORDERED that Plaintiffs' "Rule 65 and 25 U.S.C. 1651 Application for a Temporary Restraining Order and Order to Show Cause Why a Preliminary or Permanent Injunction Should Not Issue" (dkt. no. 996), is hereby DENIED in all respects.

DATED this 2 day of July, 2008.

BY THE COURT:

/s/ Bruce S. Jenkins

BRUCE S. JENKINS

United States Senior District Judge

Case No. 20080443-SC

IN THE SUPREME COURT OF THE STATE OF UTAH

Susan Rose,

Petitioner,

v.

The Honorable Robert Faust,

Respondent;

Utah State Bar, Ethics and

Disciplinary Committee,

Real Party in Interest.

ORDER

This matter is before the Court on petition for extraordinary relief seeking direct review of pending disciplinary proceedings in the district court and a stay of those proceedings. The petition and request for a stay are denied.

FOR THE COURT:

7-1-08

Date

/s/ Matthew B. Durrant

Associate Chief Justice

Stamp STATE OF UTAH SUPREME COURT

Filed on July 1, 2008 – UTAH APPELLATE COURTS

Case No. 0447-0075

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF SAN JUAN COUNTY, STATE OF UTAH

RAYMOND A. WHALEY & OLETA WHALEY,
Petitioners,

vs.

YOLANDA YANITO WHALEY, Respondent

Judge: Lyle R. Anderson

MOTION FOR DISMISSAL WITH PREJUDICE

(and ORDER)

COME NOW, the petitioners, Raymond A. Whaley & Oleta Whaley, by and through counsel, Joyce G. Smith, and move the Court to dismiss this action with prejudice in accordance with Utah Rule of Civil Procedure 41(2)(ii). The Court has advised that the probability of the petitioners prevailing is low since the paternal rights of the father of the minor child have now been terminated, the petitioners can no longer afford to continue this lawsuit, and petitioners have decided not to continue seeking grandparent visitation.

WHEREFORE, the petitioners move this Court to dismiss this action with prejudice.

Dated this 8th day of June, 2005.

/s/ Joyce G. Smith

JOYCE G. SMITH

Attorney for Petitioners

ORDER

GOOD CAUSE APPEARING THEREFORE, and under terms and conditions the Court deems proper, this matter is hereby dismissed with prejudice.

Dated this 22nd day of June, 2005.

BY THE COURT:

/s/ Lyle R. Anderson

DISTRICT COURT JUDGE

STATE OF UTAH – SEVENTH DISTRICT COURT

(Court stamped copy)

No. SR-FC-1480-2004-CV

IN THE FAMILY COURT OF THE NAVAJO NATION JUDICIAL DISTRICT OF SHIPROCK

YOLANDA ROSE YANITO WHALEY

Navajo Census No. 219,729

Post Office Box 241

Aneth, Navajo Nation (Utah) 84510, Petitioner(s)

vs.

JOHN RAYMOND WHALEY

Non-Indian

l/k/a Behind Church of Christ

Montezuma Creek, Navajo Nation (Utah)

Respondent-Natural Parent(s).

FINAL ORDER AND JUDGMENT TERMINATING THE PARENTAL RIGHTS OF JOHN RAYMOND WHALEY

IN THE MATTER OF THE TERMINATION OF PARENTAL RIGHTS OVER D.C.W.

A Minor Navajo Child

NOW COMES THE COURT and having brought this matter on for hearing in chief on the 7th day of April, 2005, convening at 10:00 AM certain, and the petitioner being present and represented by counsel, Wm. P. Battles; the minor child being present, but due to his tender years excused from the Court room and present in the ante room; and the respondent despite initial service of process made upon him personally, and

affirmed as such by the Court[1] and likewise despite notice of these proceedings, John Raymond Whaley, the natural father, and hereafter referred to as the respondent, did not appear or otherwise participate in these proceedings. The adoptive [2] parents of the respondent, who were present in the courtroom only as witnesses and did not assert any other standing and did confirm that the respondent was on notice to these proceedings, and that the respondent had been unsuccessful in retaining counsel and therefore the respondent did not appear.

While the Court takes note of this it also recognizes the complexities and urgencies of this case by virtue of multiple filings in multiple jurisdictions dealing with the subject child, and it is vital to the best interest of the child that jurisdiction over his person be determined, and likewise, assuming this Court would find that it does have personal jurisdiction, then these proceedings seeking Termination of Parental Rights must be proved to this Court. This hearing was set for these two precise purposes.

Accordingly the respondent is on notice to these proceedings and fails to appear or otherwise demonstrate any interest in these proceedings, nor have any other interested parties, if any, including the "adoptive grandparents", intervened as they would be entitled to do so.

JURISDICTION

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[1] Affidavit of Service of Process indicating personal service having been completed on the 1st day of March, 2005.

[2] The term "adoptive" is used for identification purposes only. The Court makes no finding as to such legal status between Raymond and Oleta Whaley as to the respondent.

PERSONAL JURISDICTION

Jurisdiction over this Navajo child encompasses two considerations – (1) personal jurisdiction[3] and (2) subject matter jurisdiction. If a Court lacks personal jurisdiction it cannot reach the issue of the subject matter jurisdiction and it would be beyond the authority of any Court to proceed further. However, if the Court *does* have personal jurisdiction over the person being the subject of the suit, *as well as* jurisdiction over the subject matter of the proceedings, that Court has every duty to proceed – and even more so when the matter at hand encompasses the best interest of a minor child.

Based on the information provided by the Whaley's[4] and the testimony[5] and evidence before the Court[6] the minor child herein is an enrolled member of the Navajo Tribe of Indians[7] and found by this Court to be domiciled and residing at the residence of his maternal grandparents in Aneth, essentially at the "family camp", which is within the territorial boundaries[8] of the

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[3] [See at end –over length Sources of the Court's jurisdiction]

[4] Raymond and Oleta Whaley reported as to jurisdiction that the only reason they filed their proceedings in Utah state court was because Utah statutory law provided for grandparent visitation, which the Navajo tribal code did not – essentially amounting to forum shopping.

[5] Testimony was given by the petitioner, Yolanda Yanito Whaley; the maternal grandmother, Nora Yanito; and David Filfred, Vice-President, Aneth Chapter (prior police officer).

[6] Itemized exhibits related to the residency of the child – CDIB; School Registration Records; School Attendance Records.

[7] See Petitioner Exhibit 4. Certificate of Degree of Navajo Blood.

[8] 7 NNC 254. Territorial jurisdiction.

A. The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior

Navajo Nation. The petitioner, likewise, is also determined by this Court to be domiciled and residing within the territorial boundaries of the Navajo Nation also at the family residence in Aneth[9] and is employed at the Montezuma Creek Health Clinic. While for employment purposes she frequently stays with a friend at or near Bluff, Utah. According to testimony, she does so with no intention of taking up residence or domicile at or near Bluff, Utah. Other than for purposes of accommodating her employment, the petitioner has no other affairs in State of Utah except for her Utah Drivers License[10] which confirms her residence and domicile to be on the Navajo Nation at or near Aneth within the territorial boundaries of the Navajo Nation.

Our Navajo Courts have previously dealt with the issue of temporary absences from the Navajo Nation for education or employment purposes as having generally

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boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency. All land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, all land owned in fee by the Navajo Nation, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.

B. The Courts of the Navajo Nation may also exercise jurisdiction over any action for probate, domestic relations, child custody, adoption and Navajo Nation benefits and services, in which a party is a Navajo resident of the Hope-Partitioned Lands.

[9] Itemized exhibits related to the residency of the petitioner – CDIB; Utah Drivers License, Chapter Verification of Residency.

[10] The Navajo Nation has adopted statutory law which requires that operators of motor vehicles within the territorial boundaries of the Navajo Nation must possess a valid driver's license. It relies on the states for such services, depending on which portion of the Navajo Nation a person may live. In the case of the petitioner – a Utah driver's license.

no affect on jurisdiction in dealing with the domestic affairs of Navajo people.[11]

The Court therefore concludes that this Court has personal jurisdiction over the petitioner and her son, the subject child herein whereas – the subject child is an enrolled member of the Navajo Nation. He resides and is domiciled within the territorial boundaries of the Navajo Nation. The petitioner likewise is Navajo and resides and is domiciled within the territorial boundaries of the Navajo Nation. This Court alone has personal jurisdiction over the minor child. This Court also has personal jurisdiction over the petitioner for cause of her residency and domicile within the Navajo Nation at or near Aneth – All of which satisfies any federal limitations otherwise within the content of either *Montana*[12] or *National Farmers Insurance*[13] notwithstanding *Lara*[14]or *Potowatami* [15] and is likewise consistent with Executive Order 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000); the Treaties of 1849 and 1868; 18 USC 1151; 25 USC 450, et seq; 1301, et seq; 1360; 1321-3601, et seq; and 3651, et seq.

Therefore determining that this Court alone has personal jurisdiction over the subject child, the next matter is one determining subject matter.

SUBJECT MATTER JURISDICTION

This Court is a court of general jurisdiction. Pursuant to the general grant of the Navajo Nation Council, the

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[11] See *Kathleen Yazzie v. Virgil Wyacu, Jr.* 1 Nav. R. 134.

[12] *Montana v. United States*, 450 U.S. 544, 565-566 (1981)

[13] *National Farmer's Ins. Co. v. Crow* , 471 U.S. 845, 855-856 (1985)

[14] *U.S. v. Lara*, 2004 U.S. 2738, 541 U.S. 193

[15] *Prairie Band Potowatami Nation v. Wagnon*, 2005 U.S. App. 4861 (March 25, 2005)

legislative body of the Navajo Nation, the Family Courts of the Navajo Nation have exclusive subject matter jurisdiction "over *all cases involving domestic relations*, probate, adoption, paternity, custody, child support, guardianship, mental health commitments, mental and/or physical incompetence, name changes, and *all matters arising under the Navajo Nation Children's Code*."[16]

Wherein Navajo statutory law provides at 9 NNC 1003 that the "Family Courts of the Navajo Nation shall have original exclusive jurisdiction over all matters arising under the Navajo Nation Children's Code." The scope and range of such original exclusive jurisdiction is itemized in 9 NNC 1005.[17]

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[16] 7 NNC 253(R)

[17] Jurisdiction of the Family Court.

A. The Family Court shall have exclusive original jurisdiction over all proceedings under the Family Court in which a child is alleged to be a child in need of supervision, dependent child, or a delinquent child.

B. The Family Court shall have exclusive original jurisdiction of the following proceedings:

1. For the termination of parental rights;
2. For the adoption of a child;
3. To determine custody of, or to appoint a custodian or guardian for a child;
4. For the commitment of a mentally retarded or mentally ill child;
5. To authorize the marriage of a minor who does not have a parent or guardian, or when a parent or guardian refuses to consent, when the law requires consent to the marriage by a parent or guardian.

C. Jurisdiction obtained by a Family Court over a child is retained until termination by any of the following situations:

1. The child becomes an adult, except where a child becomes an adult during the pendency of proceedings in the Family Court.
2. The case is transferred by the court to the district court pursuant to § 1114 of this Code.

Instantly before the Court are proceedings for the termination of parental rights of the respondent-natural father. Pursuant to both the Navajo Nation Children's Code, as well as the Indian Child Welfare Act.[18] This Court has exclusive jurisdiction over such subject matter *regardless* of the residence or domicile of the subject child as by Congressional intent set forth in the Indian Child Welfare Act.[19] This Court also has subject matter jurisdiction over all cases involving domestic relations – accordingly any matter that relates to this Navajo child while this child remains to be residing and domiciled within the Navajo Nation this Court has jurisdiction over, including any and all forms

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3. When the Family Court enters an order terminating jurisdiction.

D. Territorial jurisdiction. The Family Court may hear child custody matters involving Navajo children wherever they may arise. The Court may decline jurisdiction in appropriate circumstances where a forum with concurrent jurisdiction is exercising its jurisdiction. The Family Court shall have jurisdiction over non-Navajo child custody matters arising within the boundaries of the Navajo Indian Country when the parties submit to the jurisdiction of the Court or when the best interests of the child require such an arrangement. The Family Court shall have exclusive jurisdiction over any Navajo child who resides or is domiciled within the borders of Navajo Indian Country, or who is a ward of the Family Court.

[18] 25 USC 1901, et seq.

[19] 25 USC 1911. (a) Exclusive jurisdiction. An Indian Tribe shall have jurisdiction exclusive as to any State or any child custody proceedings involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

of causes of action which affect the domestic relations of the subject child.

CASE IN CHIEF

Proceedings in termination of parental rights (TPR) are a civil matter in nature. Pursuant to the Navajo Nation Rules of Civil Procedure, which are applicable to such proceedings, the respondent is afforded notice of the proceedings by way of service upon him of the summons and petition. Service of process was made on the respondent in these proceedings by personal service of a copy of the summons and petition to his last known place of residence within the Navajo Nation at the home of his "adoptive" parents in Montezuma Creek, Navajo Nation (Utah) on the 13th day of February, 2005, and based on the information provided by the "adoptive" parents as to the whereabouts of the respondent[20] personal services was made on the respondent pursuant to the Rules of Procedures applicable in the State of Texas, and was made by and through Deputy Tommy Hernandez, of the Ochiltree County Sheriff's Office, Ochiltree County, Perryton, Texas. The Court is satisfied that the respondent was and is on good and sufficient notice of these proceedings. This matter therefore proceeded on to hearing.

The following witnesses were present, and being identified to the Court as such, were excused until

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[20] It is noted here that while the Whaleys report in their pleadings to the Utah Seventh Judicial District that they had no knowledge as to the whereabouts of the respondent natural-father and only had sporadic contact with the respondent at best – the truth of the matter is they knew precisely where the natural father was located and provided both the address and telephone number of the respondent for purposes of service of process.

called as provided under the Navajo Nation Rules of Civil Procedure in accord with the confidentiality of proceedings involving minor children:

1. Yolanda Yanito Whaley, initiating party to the proceedings;

2. Nora Yanito, the maternal grandmother of the subject child;

3. Hazel Myerson, maternal great-grandmother of the subject child;

4. Virginia Hoskie, Tribal Office of Social Services, under subpoena;

5. Davis Filfred, Navajo Division of Public Safety, under subpoena;

6. Raymond Whaley, "adoptive" paternal grandfather of the subject child through their "adopted" son, the respondent herein, under subpoena;

7. Oleta Whaley, "adoptive" paternal grandmother of the subject child through her adopted son, the respondent herein, under subpoena.

In first instance the Tribal Office of Social Services requested that the Court take notice that the Office of Social Services was unable to contact the respondent, despite repeated efforts, and would therefore make NO recommendation to the Court as to the disposition of the issue of whether or not the parental rights of the respondent should, or should not, be terminated, and would leave the matter entirely to the discretion of the Court. Accordingly, the Office of Social Services was excused from the proceedings, and the Social Services report accepted accordingly – without recommendation.

The Court thereafter took the testimony of the petitioner, Yolanda Yanito Whaley; Nora Yanito, maternal grandmother to the minor child; and Davis Filfred, a prior officer with the Navajo Division of Law Enforcement, and presently Vice-President of the Aneth Chapter.

Premised on the testimony it is the finding of this Court that the relationship between the petitioner and the respondent John Raymond Whaley, as well as with his family, was extremely strained. Prior to the marriage of the parties the petitioner was made to be embarrassed and ridiculed as to her pregnancy by her future in-laws, the Whaleys, and she was likewise, and against her free will made to participate in religious rituals and activities performed by her in-laws of which she had no desire to participate in and which could not have possibly attributed to the well-being of the baby within the scope of Navajo tradition and practices. The petitioner was also belittled by being told that her child would be "born of the devil" and would be a "bastard" by her future in-laws – at all time being conveyed with the knowledge of the respondent. Likewise, testimony also reflected that the respondent nor his "family" ever provided financially for his wife or son, either while the couple were together, and certainly not since his abandonment of his wife and child over the preceding 3 years or so before these proceedings came on. Only the petitioner was lawfully employed and was the sole provider for the family. According to testimony, what little financial contribution that was provided by the respondent resulted from his selling of illegal drugs.

It is the further finding of this Court that the "family" lived in a small travel trailer adjacent to the residence of the respondent's "adoptive" parents who reside in

Montezuma Creek behind the Navajo Church of Christ, a local Christian church of which Mr. Raymond Whaley is the resident pastor. The accommodation that the petitioner, respondent, and infant child lived in was one of squalor – described as being cluttered with trash, garbage, papers everywhere, with barely a channel to walk through to which the respondent refused to allow the petitioner to clean; no sewage or running water to speak of, and despite this raw sewage held in the commode, and the respondent actually storing open containers of human urine within the home so that after evaporation he could use the residue salt peter for the manufacture of various homemade explosive devices.[21] Such devices were tested with small animals, and other means. One incident described the respondent capturing and caging a small dog and attempting to detonate a homemade explosive device in an attempt to kill the animal, but only to see it fail and instead of exploding the device, ignited it setting the animal aflame. When the flames extinguished, and while the animal was still alive, the respondent thereafter doused the animal with a flammable liquid and reignited the animal. Strangulation of kittens and other small animals likewise occurred with the very graphic testimony of the respondent putting a noose around the neck of kittens and then swinging them around until they expired – thereafter leaving the animals on the doorstep for all to see – including the petitioner and the infant child. The kittens belonged to the respondent's younger "adopted" sister.

The maternal grandmother's testimony was consistent with that of the petitioner to the extent that the

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[21] See Petitioner's Exhibits 9 through 14.

grandmother interceded by having her daughter and grandson live with her and that her daughter and the subject child had lived with her in Aneth for over the preceding three (3) years.

The testimony of Davis Filfred reflected that while he was an officer with the Navajo Division of Law Enforcement he investigated the incident of the 24th day of April, 2001, where the petitioner and her minor son left the marital domicile to live with the maternal grandmother following a brutal and disfiguring beating at the hands of the respondent while the petitioner and her child resided at her in-laws, the Whaleys.

Such has been the finding of this Court herein as set forth in the foregoing and that based upon the preponderance of the evidence submitted in this matter this court finds beyond a reasonable doubt that any further relationship with the respondent herein, in any form or fashion, is likely to result in serious emotional damage and/or physical injury to the subject child.

It is the further finding of this Court that the respondent has abandoned the subject child as a matter of statutory law[22] and has made no effort whatsoever to maintain a parental relationship with the child and that the respondent has seriously neglected and willfully abused the child.

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[22] 9NNC 1002(A). "Abandoned" means the failure of the parent to provide reasonable support and maintain regular contact with the child, including the provision of adequate supervision. Failure to maintain a normal parental relationship with the child without just cause for a period of six (6) months shall constitute prima facie evidence of abandonment. Custody with extended family members or voluntary placement does not constitute abandonment.

It is likewise the finding of this Court that the petitioner is a competent, responsible, and providing mother to the subject child.

IT IS THEREFORE ORDERED, ADJUGED, and DECREED:

1. That the parental rights of the respondent John Raymond Whaley be and are hereby terminated with no legal rights, privileges, duties and/or obligations with respect to his son, Deven Corbin Whaley, surviving hereinafter – except the duty of support for the child and the right of inheritance to the child unless or until the child may otherwise be adopted; and,

2. That the petitioner, be and is awarded permanent sole legal and physical custody of the subject child; and,

3. That this order issues immediately, and is permanent and final pursuant to 9 NNC § 1306 of the Navajo Nation Children's Code and 25 USC 1911,[23] and thereby subject to full faith and credit as a matter of federal law and Congressional intent for purposes of enforcement.

4. That the respondent be and is afforded until the 12th day of May, 2005, to bring forward his case to set aside this Order for good and sufficient cause.

So signed and Ordered this 26th day of April, 2005.

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[23] 25 USC 1911 (d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes. "The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to the Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

/s/ (signed illegible)

FAMILY COURT JUDGE OF THE NAVAJO NATION

Certified by Clerk, Courts of the Navajo Nation

Fn.3 **Supra**. The term "adoptive" is used for identification purposes only. The Court makes no finding as to such legal status between Raymond and Oleta Whaley as to the respondent.

7 NNC 253. Jurisdiction – Generally.

A. The District Courts of the Navajo Nation shall have original jurisdiction over:

1. Crimes. All offenses in the Navajo Nation Criminal Code (17 NNC 101, et seq.) whereby any person commits an offense by his or her own conduct if the conduct constituting any element of the offense or a result of such conduct occurs within the territorial jurisdiction of the Navajo Nation Courts as defined in 7 NNC 254, or such other dependent Indian communities as may hereafter be determined to be under the jurisdiction of the Navajo Nation and the Courts of the Navajo Nation. The Navajo Nation Courts shall also have jurisdiction over any member of the Navajo Nation who commits an offense against any other member of the Navajo Nation wherever the conduct which constitutes the offense occurs.

2. Civil Causes of Action. All civil actions in which the defendant (1) is a resident of Navajo Indian Country, or (2) has caused an action or injury to occur within the territorial jurisdiction of the Navajo Nation.

3. Miscellaneous. All other matters provided by Navajo Nation statutory law, Dine' bi beenahz' 'aanii,

and Navajo Nation Treaties with the United States of America or other government. All causes of action recognized in law, including general principles of American law applicable in Courts of general jurisdiction.

B. The Family Courts of the Navajo Nation shall have original exclusive jurisdiction over all cases involving domestic relations, probate, adoption, paternity, custody, child support, guardianship, mental health commitments, mental and/or physical incompetence, name changes, and all matters arising under the Navajo Nation Children's Code.

7 NNC 253(a.) Long-Arm Civil Jurisdiction and Service of Process Act.

A. Definitions. As used in this Act, the term "person" includes an individual, executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of the Navajo Nation and whether or not organized under the laws of the Navajo Nation. The term includes all persons, natural or fictitious, of any kind.

B. Personal jurisdiction based on enduring relationship or status. A Court of the Navajo Nation may exercise personal and subject matter jurisdiction over a person domiciled in, organized under the laws of, or maintaining his, her or its place of business in the Navajo Nation may exercise personal jurisdiction over any member of the Navajo Nation regarding that person's status as a member of the Navajo Nation. A Court of the Navajo Nation may exercise civil jurisdiction over any person who assumes tribal relations with Navajos and the Navajo Nation by

marriage, adoption, guardianship, or other enduring relationship with Navajos.

C. Personal jurisdiction based on conduct. A Court of the Navajo Nation may exercise personal and subject matter jurisdiction over any non-member who consents to jurisdiction by commercial dealings, residence, employment, written or implied consent, or any action or inaction which causes injury which affects the health, welfare, or safety of the Navajo Nation, or any other act of its members located within the territorial jurisdiction of the Navajo Nation, or any other act which constitutes the assumption of tribal relations and the resulting express or implied consent to jurisdiction. A Court of the Navajo Nation may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action for relief arising from the person's

(1) Transacting any business in the Navajo Nation;

(2) Contracting at any place to supply services or things within the Navajo Nation;

(3) Causing tortuous injury by any act or omission within the Navajo Nation;

(4) Causing tortuous injury in the Navajo Nation by an act of omission outside the Navajo Nation if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue for goods used or consumed or services rendered in the Navajo Nation; and,

(5) Having an interest in, using, or possessing real property in the Navajo Nation, including the actual occupancy or lease of trust land, allotted land, fee land, or any other land within the Navajo Indian Country;

(6) Contracting to insure any person, property or risk located within the Navajo Nation;

(7) Causing an act which creates an environmental hazard or degradation of the air, water, flora, fauna, cultural artifact, or other resource of the Navajo Nation;

(8) Selling alcohol to any person who enters the Navajo Nation and who causes an injury in the Navajo Nation under the influence of alcohol; or,

(9) Any action or inaction outside this jurisdiction which causes actually injury or damage within the Navajo Nation, where such injury or damage was reasonably foreseeable.

D. Service of process outside the Navajo Nation. When the exercise of personal jurisdiction is authorized by this Act, service of process may be made outside the Navajo Nation, and where such service is not reasonably feasible, service may be made by any means which is likely to give the defendant actual notice of the pendency of an action.

E. Inconvenient forum. When a Navajo Nation Court finds that in the interest of substantial justice the action should be heard in another forum, the Court may stay or dismiss the action in whole or in part on any condition that maybe just.

F. Other basis of jurisdiction unaffected. A Court of the Navajo Nation may exercise jurisdiction on any other basis authorized by law, including the inherent and treaty jurisdiction of the Navajo Nation.

G. Manner and proof of service.

1. When the law of the Navajo Nation authorizes service outside the Navajo Nation, the service, when calculated to give actual notice, may be made:

(a) By personal delivery in the manner prescribed for service within the Navajo Nation;

(b) In the manner prescribed by the law of the place in which service is made in an action in any of its courts of general jurisdiction;

(c) By any form of mail addressed to the person to be served and requiring a signed receipt;

(d) As directed by a foreign authority in response to a letter rogatory; or

(e) As directed by the Court.

2. Proof of services outside the Navajo Nation may be made by affidavit of the individual who made the service or in the manner prescribed by the law of the Navajo Nation, the order pursuant to which service is made, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. When service is made by mail, proof of service shall include a receipt signed by the addressee satisfactory to the Court and showing that the service was reasonably calculated to give actual notice.

H. Individuals to be served; ; special cases. When the law of the Navajo Nation requires that in order to affect service one or more designated individuals be served, service outside the Navajo Nation under this Act must be made upon the designated individual or individuals.

1. Assistance to tribunals and litigants outside the Navajo Nation.

I. A Court of the Navajo Nation may order service upon any person who is domiciled or can be found within the Navajo Nation of any document issued in connection with a proceeding in a tribunal outside the Navajo Nation. The order may be made upon application of any interested person or in response to a letter rogatory issued by a tribunal outside the Navajo Nation and shall direct the manner of service. Otherwise, no process which is not a process issued by a Navajo Nation Court or administrative tribunal with jurisdiction over the cause may be served within the Navajo Nation, and the Navajo Nation denies consent to admission to the Navajo Indian Country to any state official or process server for the service of process unless the same is done under this Section.

2. Service in connection with a proceeding in a tribunal outside the Navajo Nation may be made within the Navajo Nation only with an order of a Navajo Nation Court.

3. Service under this section does not, of itself, require the recognition or enforcement or an order, judgment, or decree rendered outside the Navajo Nation.

4. A Navajo Nation Court may decline to order service of process where a tribunal outside the Navajo Nation lacks jurisdiction over the action, where the application is fraudulent, or where the action violates the public policy of the Navajo Nation.

J. Other provisions of law unaffected. The Act does not repeal or modify any other law of the Navajo Nation permitting any other procedure for service of process.

7 NNC 254. Territorial Jurisdiction.

A. The territorial jurisdiction of the Navajo nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian Communities, all Navajo Indian allotments, all land owned in fee by the Navajo Nation, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.

B. The Courts of the Navajo Nation may also exercise jurisdiction over any action for probate, domestic relations, child custody, adoption and Navajo Nation benefits and services, in which a party is a Navajo resident of the Hopi-Partitioned Lands

Case No. 20050419-CA

IN THE UTAH COURT OF APPEALS

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YOLANDA YANITO WHALEY, Petitioner

vs.

HONORABLE LYLE R. ANDERSON, Respondent

ORDER

Before Judges Billings, Jackson, and Orme.

This matter is before the court on Yolanda Yanito Whaley's Petition for Extraordinary Writ filed pursuant to Rule 19 of the Utah Rules of Appellate Procedure.

A person may petition the court for extraordinary relief under Utah Rule of Civil Procedure 65B "where no other plain, speedy and adequate remedy is available." Utah R, Civ, P, 65B(a). Yolanda had a remedy in the underlying case through an interlocutory or final appeal of the district court's determination regarding subject matter jurisdiction. "By ignoring a plain, speedy and adequate remedy at law, [Yolanda] placed [herself] out of reach of the extraordinary writ of mandamus." Merrihew v. Salt Lake County Planning, 659 P.2d 1065, 1067 (Utah 1983) (quotations and citation omitted).

It further appears from the record that Yolanda has an additional remedy in the district court regarding her challenge to that court's subject matter jurisdiction, as a challenge to subject matter jurisdiction may not be waived by either party and may be raised at any time. See Barnard v. Wassermann, 855 P.2d 243; Olson v. Salt Lake City Sch. Dist., 724 P.2d 960, 964 (Utah 1986).

From all that appears in the record before us, the district court does lack subject matter jurisdiction over the underlying case. Nevertheless, an extraordinary writ petition cannot be used as a substitute for appeal. Having failed to avail herself of her right to appeal, Yolanda may not seek reversal through this petition.

IT IS HERBY ORDERED that the Petition for Extraordinary Writ is denied.

Dated this 26th day of May, 2005.

FOR THE COURT:

/s/ Judith M. Billings

JUDITH M. BILLINGS,

Presiding Judge

(Court stamped copy)

Filed May 20, 2005 in UTAH APPELLATE COURTS

CONSTITUTIONAL PROVISIONS

Article VI sec. 2 and 3

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath

or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

The First Amendment of the United States Constitution

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

UTAH JUDICIAL COUNCIL RULES OF JUDICIAL ADMINISTRATION

Rules of Lawyer Discipline and Disability (RLDD)

14-501(c) " Formal disciplinary and disability proceedings are civil in nature."

14-517 "(b) Standard of proof. Formal complaints of misconduct, petitions for reinstatement and readmission, and petitions for transfer to and from disability status shall be established by a *preponderance of the evidence.* .....

(c) Burden of proof. The burden of proof in proceedings seeking discipline or transfer to disability status is on the OPC. The burden of proof in proceedings seeking a reversal of a screening panel recommendation of discipline, or seeking reinstatement, readmission, or transfer from disability status is on the respondent..... "

14-504 OPC (b) powers and duties

"(b)(4) prosecute before the screening panels, the district courts, the Supreme Court, and any other courts, including but not limited to, any court of the United States all disciplinary cases and proceedings for transfer to or from disability status"

Rule 14-510. Prosecution and appeals. (Changed Nov. 1, 2009 to include a possibility of examination and cross examination if the screening panel chair so allows, on a case by case basis)

(a) Informal complaint of unprofessional conduct.

(a)(1) Filing. A disciplinary proceeding may be initiated against any member of the Bar by any person, OPC counsel or the Committee, by filing with the Bar, in writing, an informal complaint in ordinary, plain and concise language setting forth the acts or omissions claimed to constitute unprofessional conduct. Upon filing, an informal complaint shall be processed in accordance with this article.

(a)(2) Form of informal complaint. ..... The informal complaint shall be signed by the complainant and shall set forth the complainant's address, and may list the names and addresses of other witnesses. The informal complaint shall be notarized and contain a verification attesting to the accuracy of the information contained in the complaint. In accordance with Rule 14-504(b), complaints filed by OPC are not required to contain a verification. The substance of the informal complaint shall prevail over the form.

(a)(3) Initial investigation. Upon the filing of an informal complaint, OPC counsel shall conduct a preliminary investigation to ascertain whether the informal complaint is sufficiently clear as to its allegations. If it is not, OPC counsel shall seek additional facts from the complainant; additional facts shall also be submitted in writing and signed by the complainant.

(a)(4) Notice of informal complaint. Upon completion of the preliminary investigation, OPC counsel shall

determine whether the informal complaint can be resolved in the public interest, the respondent's interest and the complainant's interest. OPC counsel and/or the screening panel may use their efforts to resolve the informal complaint. ....The NOIC shall have attached a true copy of the signed informal complaint against the respondent and shall identify with particularity the possible violation(s) of the Rules of Professional Conduct raised by the informal complaint as preliminarily determined by OPC counsel.

(b) Proceedings before Committee and screening panels.

....

(b)(3) Complainant's appearance. A complainant shall have the right to appear before the screening panel personally and, together with any witnesses called by the complainant, may testify.

(b)(4) Right to hear evidence; cross-examination. The complainant and the respondent shall have the right to be present during the presentation of the evidence unless excluded by the screening panel chair for good cause shown. Respondent may be represented by counsel, and complainant may be represented by counsel or some other representative. *Either complainant or respondent may seek responses from the other party at the hearing by posing questions or areas of inquiry to be asked by the panel chair. Direct cross-examination will ordinarily not be permitted except, upon request, when the panel chair deems that it would materially assist the panel in its deliberations.* **[newly added].**

(b)(6) Screening panel determination. Upon review of all the facts developed by the informal complaint,

answer, investigation and hearing, the screening panel shall make one of the following determinations:

(b)(6)(E) A formal complaint shall be filed against the respondent pursuant to Rule 14-511.

(b)(7) Recommendation of admonition or public reprimand. ....

(c) Exceptions to admonitions and public reprimands. Within 30 days after service of the recommendation of an admonition or public reprimand on respondent, respondent may file with the Committee chair exceptions to the recommendation and may request a hearing. The exceptions shall include a memorandum, not to exceed 20 pages, stating the grounds for review, the relief requested and the bases in law or in fact for the exceptions.

(d) Procedure on exceptions.

(d)(1) Hearing not requested. If no hearing is requested, the Committee chair will review the record compiled before the screening panel.

(d)(2) Hearing requested. If a request for a hearing is made, the Committee chair or a screening panel chair designated by the Committee chair shall serve as the Exceptions Officer and hear the matter in an expeditious manner, with OPC counsel and the respondent having the opportunity to be present and give an oral presentation. The complainant need not appear personally. However, upon motion to the Exceptions Officer and for good cause shown, respondent may seek to augment the record before the screening panel or the original brief on exceptions, including:

(d)(2)(A) A request to call complainant as an adverse witness for purposes of cross-examination if complainant was not subject to direct cross-examination before the screening panel, and

(d)(2)(B) A request for time to obtain a transcript of the screening panel proceedings to support respondent's exceptions, the cost of such transcript to be borne by respondent. If a transcript is requested, OPC will provide the Committee chair with the transcript as transcribed by a court reporting service, together with an affidavit establishing the chain of custody of the record.

(d)(3) Burden of proof. A respondent who files exceptions under this section (d) shall have the burden of showing that the recommendation of the screening panel is unsupported by substantial evidence or is arbitrary, capricious, legally insufficient or otherwise clearly erroneous.

.....

(f) Appeal of a final Committee determination of admonition or public reprimand.

(f)(1) Within 30 days after service by OPC of a final, written determination of an admonition or a public reprimand in a matter for which exceptions have been filed by respondent under subsection (c), respondent may file a request for review with the Supreme Court seeking reversal or modification of the final determination by the Committee.

.....

(f)(4) The Supreme Court shall conduct a review of the matter on the record.

.....

Rule 14-522. Reciprocal discipline.

"(a) Duty to notify OPC counsel of discipline. Upon being publicly disciplined by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction, a lawyer admitted to practice in Utah shall within 30 days inform the OPC of the discipline. Upon notification from any source that a lawyer within the jurisdiction of the Supreme Court has been publicly disciplined by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction, OPC counsel shall obtain a certified copy of the disciplinary order.

(b) Notice served upon lawyer. Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in Utah has been publicly disciplined by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction, OPC counsel shall issue a notice directed to the lawyer containing:

(b)(1) a copy of the order from the other court, jurisdiction or regulatory body; and

(b)(2) a notice giving the lawyer the right to inform OPC counsel, within 30 days from service of the notice, of any claim by the lawyer predicated upon the grounds set forth in paragraph (d), that the imposition of the equivalent discipline in Utah would be unwarranted, and stating the reasons for that claim.

(c) Effect of stay of discipline in other jurisdiction. If the discipline imposed in the other court, jurisdiction or regulatory body has been stayed, any reciprocal

discipline imposed in Utah shall be deferred until the stay expires.

(d) Discipline to be imposed. Upon the expiration of 30 days from service of the notice pursuant to paragraph (b), the district court shall take such action as may be appropriate to cause the equivalent discipline to be imposed in this jurisdiction, unless it clearly appears upon the face of the record from which the discipline is predicated that:

(d)(1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(d)(2) the imposition of equivalent discipline would result in grave injustice; or

(d)(3) the misconduct established warrants substantially different discipline in Utah or is not misconduct in this jurisdiction.

If the district court determines that any of these elements exist, it shall enter such other order as it deems appropriate. The burden is on the respondent to demonstrate that the imposition of equivalent discipline is not appropriate.

(e) Conclusiveness of adjudication in other jurisdictions. Except as provided in paragraphs (c) and (d) above, a final adjudication of the other court, jurisdiction or regulatory body that a respondent has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in Utah

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

COMPLAINT

IN THE MATTER OF DISCIPLINE OF SUSAN ROSE #07985

The Utah State Bars Office of Professional Conduct OPC"), by and through Barbara L. Townsend, Assistant Counsel, complains against the Respondent, Susan Rose, as follows:

I. PARTIES

1. Ms. Rose is an attorney licensed in the State of Utah and a member of the Utah State Bar. Her address according to the records of the Executive Director of the Utah State Bar is 9553 South Indian Ridge, Sandy, Utah 84092.
2. According to Utah State Bar records, Ms. Rose has been a member of the Utah State Bar since *1997*.

3, This Complaint is filed on behalf of the Utah State Bars Office of Professional Conduct as directed by the Ethics and Discipline Committee of the Utah Supreme Court, and is based upon two Informal Complaints submitted against Ms.
Rose; one by Joyce Smith and the other by the OPC.

II. JURISDICTION AND VENUE

4. The OPC served a Notice of Informal Complaint ("NOIC") on Ms. Rose in the OPC matter on February 11, 2004.

5. The OPC served the NOIC on Ms. Rose in the Smith matter on June 7,
2005.

6. A Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court heard the OPC and Smith matters on September *13*, 2007.

7. At the conclusion of the hearings on September 13, 2007, the Screening Panel directed the OPC to file formal complaints against Ms. Rose in both matters.

8. Jurisdiction is proper in this Court pursuant to Rule 14.511(a), Supreme Court Rules of Professional Practice, Rules of Lawyer Discipline and Disability.

9. Venue is proper in this Court pursuant to Rule 14-511(b), Rules of Lawyer Discipline and DisabHity in that, at all relevant times, Ms. Rose resided or practiced law in Salt Lake County.

III FACTUAL ALLEGATIONS
(OPC Matter)

10. On October 3, 2001, the OPC received a letter regarding Ms. Rose's handling of the case of *Dr. Steven MacArthur et aL v. San Juan County et al* and referring an opinion issued by the Honorable Dale A.

Kimball on September 19, 2001 in addressing Ms. Rose's conduct In that mailer. Ms. Rose was representing the Plaintiffs in that action.

11. On April 12, 1999, Ms. Rose flied suit in the Navajo Tribal Court on behalf & her clients, some former employees of the Montezuma Clinic ("Plaintiffs, against numerous individual Defendants and San Juan County ('Defendants").

12. The Complaint sought control of the Montezuma Clinic and damages for discrimination and other torts.

13. The Tribal Court issued an Order on March 3, 2000 granting the relief requested and additionally directing the Defendants to pay a fine of $10,000 per day for each day the mandate was not carried out The Order further ordered each individual Defendant to pay $1000 per day of the $10,000 from their own personal assets.

14. Ms. Rose sought and obtained from the Navajo Tribal Court a Special Order granting Plaintiffs leave to sue In Utah federal court to enforce the orders of the Navajo Tribal Court.

15. Ms. Rose filed a Complaint on July 25, 2000 on behalf of the Plaintiffs against San Juan County and several Individual Defendants in the United States District Court for Utah ("District Court"). The claims included: civil rights violations; RICO claims; federal antitrust claims; mail fraud; witness tampering; interference with commerce by threats; claims under the Freedom of Access to Clinic Entrances Act Health

Care Quality Improvement Act, Emergency Medical Treatment and Active Labor Act, and the Medical Bill of Rights. The complaint, drafted by Ms. Rose, also included numerous state law tort, contract claims, and federal common law claims.

16. The complaint sought the "entry of sweeping declaratory judgments and writs of mandamus requiring a GAO audit of federal funds expended by the county for the previous ten years, an IRS audit of payroll tax withholding, the convening of a federal grand jury investigation, and the immediate seizure or sequestration of the Defendants entities' financial records by the U.S. Marshalls pending the investigation and the GAO and IRS audits." [1]

17. During her representation of Plaintiffs in the District Court, Ms. Rose filed numerous pleadings and motions that were later found to be frivolous,

18. At one point, the Defendants brought a motion claiming that Ms. Rose should be disqualified because she had contacted one of the named Defendants who was represented by counsel, and attempted to represent him while representing the Plaintiffs.

19. On October 14, 2000, the Honorable Dale Kimball granted the Defendants' motion to dismiss based on sovereign immunity and denied the Plaintiffs' Motion for Preliminary Injunction requesting enforcement of

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[1] **Memorandum Decision and Order,** *MacArthur et al v. Sen Juan County*, Case No. 2:OOCVOOSB4, June 13, 2005, at 6-7.

the Tribal Court Orders.

20. On or about December 14, 2000, Judge Kimball declared that the Tribal Court Orders were not enforceable against two other Defendants based upon lack of jurisdiction.

21. Although the decisions of the District Court were not final judgments, on December 27, 2000 Ms. Rose filed a Notice of Appeal to the Tenth Circuit Court of Appeals.

22. On March 7, 2001, Judge Kimball Issued an Order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure certifying the prior Orders for appeal.

23. On June 3,2001, Ms. Rose filed a motion to disqualify Judge Kimball from the case,

24. As a basis for the disqualification, Ms. Rose stated that the case involves Mormon Church leaders in San Juan County' and had Judge Kimball ruled for her clients, he would have been supporting the Navajo Court findings and this would have caused political and social embarrassment."[2]

25. Ms. Rose also complained that if Judge Kimball, "being a member of said Church and an acknowledged social leader in Utah, would have ruled to enforce the

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[2] See Motion for Recusat Memorandum of Law, *MacArthur*, et al *v*, *San* Juan *County*, *et at*, Case No. 2:OOCV0584 June 15 2001, at 4.

civil rights of the Navajo Court plaintiffs, Judge Kimball may have been subjected to great social and political pressures.[3]

26. In his 16 page Recusal Order, Judge Kimball explained that "Plaintiffs will not find a judge *more* sympathetic to Lheir claims, *more* willing to apply the law impartially, or *more* patient with the bIunderinghut probably well-meardng efforts of Plaintiffs counsel" but granted the motion because "Plainttffs have lost faith in this court's ability to treat them impartially, and in tight of this court's numerous reprimands of Plaintiffs and their counsel, which rephmands, while justified, have obviously fueled Plaintiffs' loss of confidence ...." [4]

27. In his opinion, Judge Kimball commented on the conduct of Plaintiffs' counsel stating that at one point he had instructed Plaintiffs to refrain from filing any motions because of 'Plaintiffs constant stream of motions, corrections to motions, amendments to motions, refilling of motions after the responsive memorandum had been filed by the Defendants, and further briefing of motions after oral argument ...[5]

28. Further, Judge Kimball commented, "if Plaintiffs had done their homework before conjuring up claims of bias as a pretext for their unmeritorious and/or incomprehensible claims, they would have discovered

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[3] *Id.* at 7.

[4] Recusal Order, *MacArthur et al v. San Juan* County et al, Case No. 2:000V00584, September 19, 2001. at 10.

[5] Id. at 9

that this court has previously demonstrated its respect for the jurisdiction of the Navajo Court [6]

29. With regard to the recusal motion, Judge Kimball stated that "Plaintiffs also cast various aspersions regarding this court's alleged statements during oral arguments, without any citations to transcripts to demonstrate that such statements were actually made and the context in which they are made. To the extent that there exists any kernel of truth in any of the various statements that Plaintiffs allege that the court made, the statements, riot surprisingly, have been taken entirely out of context and/or mischaracterized, as the court simply did not make the global statements discussed in the affidavits supporting Plaintiffs' motion for recusal or their proposed amendments"[7]

30. Judge Kimball also stated that "it was apparent in various memoranda and oral arguments throughout this litigation that Plaintiffs and their counsel do not appear to understand the contents of [the prior] Orders or the reach of those Orders, as they have repeatedly mischaracterized and/or misinterpreted various statements in the Orders"[8]

31. Judge Kimball expressed his frustration with Ms. Rose stating, "the court has clearly demonstrated its frustrations with Plaintiffs and their counsel for their failure to understand the law or the follow the Federal Rules of Civil Procedure, the local rules, and the Rules

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[6] Id at 5

[7] Id at 4

[8] Id. at 3

of Professional Conduct."[9]

32, Judge Kimball further stated that he felt that he had demonstrated extreme patience in "tolerating Plaintiffs' counsels repeated and time-consuming calls to chambers with procedural questions and also tolerating Plaintiffs' often incomprehensible pleadings and memoranda. For example, Defendants have repeatedly—"and justifiably"—requested, during various oral arguments, that the Court dismiss Plaintiffs' Complaint based on, among other things, its utter incomprehensibility and its failure to identify which claims are alleged against which Defendants. This court, however, has declined to grant Defendants' request and has chosen to endure Plaintiffs' inscrutable Complaint.[10]

33. Judge Kimball also pointed out that not only was the conduct of Plaintiffs counsel "prejudicial to Defendants, but ft directly violates the court's March 6 Order in which the court admonished Plaintiffs to discontinue this prejudicial and unprofessional practice.[11]

34. In a footnote, Judge Kimball described Ms. Rose's conduct by stating, "only in this case would one find (1) Plaintiffs' counsel attempting to represent a Defendant in the same case; (2) a Defendant who opposes his dismissal from the case; and (3) Plaintiffs claiming that the court's bias against Plaintiffs is reflected in the court's purported interference with a *Defendant's* filing

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[9] Id at 10
[10] Id at 5
[11] Id at 11-12

of a responsive pleading."[12]

35. Judge Kimball concluded that, "it is clear that Plaintiffs' perception is not based in reality."[13]

36. On September 21, 2001 the case was reassigned to the Honorable Bruce S. Jenkins.

37, Between September, 2001 and July, *2002*, Judge Jenkins dismissed several of the claims against the remaining Defendants and granted one motion for summary judgment as to some of the discrimination claims.

38. Over the course of the proceeding before Judge Jenkins, Ms. Rose continued to file numerous motions, amendments to motions, objections to rulings and motions for reconsideration each time a ruling was made against her clients.

39. On October 7, 2002, the Tenth Circuit ruled that the jurisdictional dismissal would stand but that the sovereign immunity question was remanded for further determination.

40. On or about November 14 and 15, 2002, Judge Jenkins held a final pretrial for the remaining six Plaintiffs and remaining claims.

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[12] Id at fn.6
[13] Id at 14

41. Ms. Rose was asked by the court to proffer the facts and evidence supporting the remaining claims. After hearing all of the evidence, Judge Jenkins ruled that all of the claims should he dismissed because there was no factual basis for any claim to go forward to trial.

42. Ms. Rose filed numerous motions after the pretrial hearing.

43, On April 5, 2005 in his Order Re: Plaintiffs' April 4, 2005 Motion, Judge Jenkins denied the motion, "[un light of counsels' failure to comply with the court's local rules,"[14]

44. On June *13*, 2005, Judge Jenkins issued a 192 page Memorandum Decision and Order clarifying his rulings at the pretrial hearing in the case.

45. In the Memorandum Decision, Judge Jenkins commented, gleaning the elements of a particular antitrust law violation from·the dense thicket of the plaintiffs pleadings, original and amended, proves a daunting and largely fruitless task,"[15]

46. Judge Jenkins stated, It becomes apparent that many of plaintiffs' theories of liability had already failed as a matter of law — one because the statute in question simply does not afford Plaintiffs a private civil remedy, the others because they are legally

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[14] Order, re: Plaintiff's April 4, 2005 motion at 1.

[15] Memorandum Decision & Order, MacArthur et al v. San Juan County, et al case no. 0584 June13, 2005, at 122.

meritless..." [16]

47. With regard to his dismissal of the claims, Judge Jenkins stated, "(t)hose claims may properly be dismissed as frivolous pursuant to Fed. R. Civ. P. 16 (c)(1) because they are based upon an indisputably meritless legal theory, or are footed upon conclusory assertions rather than specific facts.[17]

48. According to Judge Jenkins, "[fjrom the commencement of this litigation, plaintiffs' counsel has taken a dramatically different approach to pleading. . claims, at times shuffling each plaintiff's factual allegations and legal assertions together as one would a deck of playing cards, sacrificing narrative sequence in favor of argumentative characterizations and conclusory assertions.[18]

49. The Court commented on the numerous motions for reconsideration that had been filed.[19]

50. On June 17, 2005, Ms. Rose filed a pleading entitled Motion and Memorandum to Disqualify Judge and Reassign Case to the Chief Judge or the 10th Circuit and Motion and Memorandum to Vacate all Orders and Judgments filed by All Plaintiffs — Hearing Requested.

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[16] Id. at 165
[17] Id at 169
[18] Id 178-179
[19] Id. at 184

51. On October 5, 2005, Judge Jenkins issued an Order re: Motion for Extension of Time & Restriction of Further Filings. He said "[this motion shall be denied for the reason that it is wholly superfluous. Further he wrote, enough is enough and ordered that no further motions be filed pending the receipt of the mandate from the Tenth Circuit[20]

52. On October 21, 2005, Judge Jenkins Issued a Memorandum Opinion & Order Re: Plaintiffs' Recusal Motions in which he stated that Ms. Rose had filed five motions to recuse him and that, "the court has reviewed, considered and denied each of the plaintiffs' disqualification motion for lack & the requisite factual grounds that would cause an objective observer reasonably to question the court's Impartiality.[21]

53. Judge Jenkins stated, "(ajs pointed out at the February 24, 2003 hearing, plaintiffs' claims were examined — and dismissed as frivolous — in the context of pretrial under Rule 16(c)('l), not under Rule 56 or Rule 12(b)(6)." [22]

54. He further noted that (o)bjectivity is often found to be in short supply in this case.[23]

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[20] Order re: Motion for Extension of Time & Restriction of Further Filings, *MacArthur, et al v. San Juan County*, et al, Case No. 2:00CV00584, October 5, 2006, at 1 and 5.
[21] Memorandum Opinion & Order Re: Plaintiffs' Recusal Motions, MacArthur, et al v. San Juan County et al,
Case No. 2:00cv0584, October 21,2005, at 21-22.
[22] Id. at 21-22
[23] Id at 23

55. Judge Jenkins commented parsing plaintiffs' various allegations as best It can, the court simply finds no sufficient basis for recusal under Sec. 455(a) on the grounds asserted by the plaintiffs.[24]

56. Judge Jenkins concluded, "[t]he underlying purpose of the plaintiffs' recusal motions may be discerned in the particular relief that plaintiffs sought: disqualification of the *entire bench* of the District Court of Utah In favor of designation of a federal district judge from outside Utah — perhaps a judge that Plaintiffs hoped may take a more favorable view of the Plaintiffs' theories of jurisdiction and liability. [25]

57. On November 9, 2005, Ms. Rose filed a Notice of Appeal to the Tenth Circuit.

58. After more motions were filed in the District Court case, Judge Jenkins issued a Minute Entry on October 5, 2006 that no further motions may be filed in this case" pending the mandate from the Court of Appeals.[26]

59. The Tenth Circuit Court of Appeals handed down Its decision regarding Judge Jenkins's rulings at the Pretrial on July 18, 2007. The appeal was dismissed as frivolous [27]

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[24] Id at 24

[25] Id at 24(emphasis in text)

[26] See 10th Cir case 05-4317

[27] See 2007 U.S. App. Lexis 17010; Bates Nos, 00044.

60. On February 23, 2004; Ms. Rose made a request to the chair of Ethics and Discipline Committee that the complaint and OPC investigation of the complaint against her be held in abeyance. The request was granted and the investigation put on hold until the abeyance was terminated on May 18,2007.

61. The Screening Panel for the Ethics and Discipline Committee heard the two cases on September 13, 2007. The Screening Panel voted that formal cases be filed In both matters.

62. Subsequent to the Screening Panel determination, Ms. Rose has filed motions in the underlying district court case resulting in an opinion issued by Judge Jenkins on November 8, 2007, stating that [at some point, litigation must come to an end, and judgments must become final. For plaintiffs . . ., this case has indisputably reached that point.[28]

(Smith Matter)

63. The OPC received a complaint regarding Ms. Rose's conduct from Joyce Smith on April 18, 2005.

64. Ms. Rose was opposing counsel in a case in which Joyce Smith filed a verified Petition for Grandparent Visitation on behalf of the Petitioners.

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[28] See Order Re: Plaintiffs Lyman & Valdez' Rule 59/60(b) Motion MacArthur et al v. San Juan County at al, case No. 2:OOCVOOSS4, at 4.

65. Ms. Rose represented the Respondent Mother of the Child at issue.

66. On November 15, 2004, Ms. Rose filed a Notice of Entry of Appearance as well as a pleading to request more time to file an answer.

67. When the motion for more time was denied, Ms. Rose filed a Motion to Stay the Proceedings.

68, On January 20, 2005, Judge Anderson set a hearing for oral argument on the Motion for Stay for February *14*, 2005.

69. On the morning of the hearing, Ms. Rose faxed a letter to the Court. In the letter she indicated that she could not attend the hearing due to an Order from the Navajo Tribal Court that, according to Ms. Rose, stated that anyone appearing In the state court would be subject to confinement for a year or a $5000 fine.

70. On the day of the hearing, Ms. Rose also filed an Objection to All Proceedings until the Federal Questions of Navajo Court Jurisdiction over all of D.C.W.'s Domestic Relations Can Be Determined in Federal Court.

71. Ms. Rose had initiated a lawsuit in District Court on behalf of the minor child of her client against the Whaley's, Ms. Smith's clients.

72. The very same motion was renewed on February 17, 2005.

73. Judge Anderson went forward with the hearing on February 14, 2005, and heard the testimony of the witnesses.

74. Ms. Rose did not appear for the hearing.

75. Judge Anderson issued an Order pursuant to the hearing on February 16, 2005.

76. In that Order, Judge Anderson stated, "as an Initial matter, the court notes that the quality of the pleadings filed In this case on behalf of the Mother suggest that her counsel is only marginally competent, if that, to practice law in Utah. The clerk is directed to make copies of all pleadings filed by counsel in this case and submit them with a copy of this order to the Office of Disciplinary Counsel of the Utah State Bar.[29]

77. The Court explained that the claim that Ms. Rose was forbidden to appear In the matter was entirely self imposed because Ms. Rose's client sought and obtained the restriction on her own.

78. Judge Anderson set another hearing In the case for March *14*, 2005.

79. On March 14,2005, the same day as the hearing, Ms. Rose filed a Motion for Disqualification of Judge

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[29] Order, 14/haley v. Whaley, February 16, 2005, at 2.

Anderson

80. Even though Ms. Smith's clients appeared for the hearing and were ready to testify In their case, the hearing was taken up with Ms. Rose's motion and nothing else was addressed.

81. Judge Anderson referred the motion to disqualify to Judge Scott N. Johansen.

82. On March 22, 2005, Judge Johansen issued an Order on Motion to Disqualify indicating that the motion was untimely and stating, "the last date of the eleven points cited in Respondents Memorandum in Support of the Motion for Disqualification in February 16, 2005, except for an undated threat to refer Judge Anderson to the 'Judicial Misconduct Committee.'[30]

83. In spite of the last that the motion was untimely, Judge Johansen addressed the issues and ruled that all eleven of the allegations "Fell woefully short of the standard."[31]

84. Judge Johansen concluded that "[t]he interjection of these other issues is so bizarre as to raise serious questions of compliance with Rule 11 URCP respondent's counsel is directed to appear and show cause why the inclusion of the requests and issues wholly irrelevant to a Rule 63 Motion, failure to sign

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[30] Order on Motion to disqualify at 1-2, Whaley v, Whaley, March 22, 2005.
[31] Id at 3

the affidavit, filing an untimely motion, objecting to a reviewing judge who is clearly authorized by the rule, and alleging facts well below the legal standard for disqualification, do not constitute a violation of Rule 11. [32]

85. On April 4, 2005, Ms. Rose filed an objection to the proceedings.

86. On April 18, 2005, after hearing argument, the Court sanctioned Ms. Rose for the unnecessary hearing on March 14, 2005.

67. The Court ordered that Ms. Rose pay attorneys fees and submit a report regarding the standard for judicial disqualification.

88. As of the date of the Screening Panel Heating, Ms. Rose had not complied with the Order.

89. In addition to the state court action, because Ms. Rose filed the federal action, Ms. Smith's clients incurred legal expense in defending that action.

90. The Federal Court action was dismissed by Judge Dee Benson on February 3, 2005.

91. Ms. Rose appealed Judge Benson's ruling to the Tenth Circuit Court of Appeals.

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[32] Id at 4

92. The appeal was dismissed for lack of subject mailer jurisdiction on March 2, 2006.

COUNT ONE
(Violation of 1.1 (Competence))
(OPC Matter)

93. Rule 1.1 (Competence), Rules of Professional Conduct, provides that ftt lawyer ihall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

94. Ms. Rose filed numerous pleadings and claims in the state courts, the United States District Court and in the Tenth Circuit Court of Appeals that were not supported by the facts or law, and which contained Inaccurate information.

95. By filing papers that were not supported by the facts and law, and which contained inaccurate information, Ms. Rose failed to provide competent representation to her client and thereby violated Rule *1.1* (Competence).

COUNT TWO
(Violation of 1.1 (Competence))
(Smith Matter)

96, Rule 1.1 (Competence), Rules of Professional Conduct, provides that: "A lawyer shall provide

competent representation to a client Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonable necessary for the representation."

97. Ms. Rose filed numerous pleadings which were only marginally competent; failed to comply with the Rules of Civil Procedure; and failed to apply the appropriate law to the facts in her case.

98. By filing papers that were not supported by the facts and law, and which contained inaccurate information, Mr. Rose failed to provide competent representation to her client and thereby violated Rule 1.1 (Competence).

COUNT THREE
(Violation of 1.7(a) (Conflict of Interest: Current Clients))
(OPC Matter)

99. Rule 1.7(a) (Conflict of Interest: Current Clients)), Rules of Professional Conduct, provides that: ". . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: 1) The representation of one client will he directly adverse to another client; or 2) There is a significant risk that the representation of one or more clients will he materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

100. Ms. Rose communicated with and attempted to represent a Defendant in the litigation whose interests were directly adverse to those & the Plaintiffs, Ms. Rose's clients.

101. By communicating with and attempting to represent a Defendant while concurrently representing the Plaintiff In the same lawsuit, Ms. Rose violated Rule 1.7(a) (Conflict of Interest: Current Clients).

COUNT FOUR
(Violation of 3.1 (Meritorious Claims and Contentions))
(OPC Matter)

102. Rule 3.1 (Meritorious Claims and Contentions), Rules of Professional Conduct, provides that: 0A lawyer shall not bring or defend a proceeding, or assert or controvert an Issue therein, unless there Is a basis for doing so that Is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in Incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."

103. Ms. Rose filed numerous claims, pleadings and appeals that were not supported by the facts and law for which there was not good faith arguments, and which caused unnecessary delays and expense to the parties and the judicial system.

104. By filing claims, pleadings and appeals without any reasonable basis, Ms. Rose violated Rule 3.1 (Meritorious Claims and Contentions).

COUNT FIVE
(Violation of 3.1 (meritorious Claims and Contentions))
(Smith Matter)

105. Rule 3.1 (Meritorious Claims and Contentions),

Rules of Professional Conduct, provides that: A lawyer shat not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established"

106. Ms. Rose filed numerous claims, pleadings and appeals that were not supported by the facts and law for which there was not good faith arrangements, and which caused unnecessary delays and expense to the parties and the judicial system.

107. By filing claims, pleadings and appeals without any reasonable basis, Ms. Rose violated Rule 3.1 (Meritorious Claims anti Contentions).

COUNT SIX

(Violation of 3.2 (Expediting Litigation))
(OPC Matter)

108. Rule 3.2 (Expediting Litigation), Rules *of* Professional Conduct, provides that "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client"

109. Ms. Rose filed a constant stream of motions, corrections to motions, amendments to motions, filed corrected or amended motions after the opposing parties filed their response, filed lawsuit on other courts, and filed appeals which had no basis.

110. Ms. Rose failed to understand the law or follow the Rules of CMI Procedure, the local rules, and the Rules of Professional Conduct.

111. By filing the above-described pleadings and failing to comply with the rules or understand the law, she unnecessarily delayed litigation to the parties' counsel and judicial system's detriment and therefore failed to make reasonable efforts to expedite the litigation, and violated Rule 3.2 (Expediting Litigation).

COUNT SEVEN
(Violation of 3.2 (Expediting Litigation))
(Smith Matter)

112. Rule 3.2 (Expediting Litigation), Rules of Professional Conduct, provides that: 4A lawyer shall make reasonable efforts to expedite litigation consistent with the Interests of the client."

113. Ms. Rose filed a constant stream of motions, corrections to motions, amendments to motions, filed corrected or amended motions after the opposing parties filed their response, filed lawsuit on other courts, and filed appeals which had no basis.

114. Ms. Rose failed to understand the law or follow the Rules of Civil Procedure, the local rules, and the Rules of Professional Conduct.

115. By filing the above-described pleadings and failing to comply with the rules or understand the law, she unnecessarily delayed litigation to the parties' counsel and judicial system's detriment and therefore failed to make reasonable efforts to expedite the litigation, and violated Rule 3.2 (Expediting Litigation).

COUNT EIGHT
(Violation of 4.2(a) (Communication With Persons Represented By Counsel))
(OPC Matter)

116. Rule 4.2(a) (Communication with Persons Represented by Counsel), Rules of Professional Conduct, provides that: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client If authorized to do so by any law, rule, or court order, In which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), (c), (d)

or (e) of this Rule.

117. Ms. Rose communicated with a represented person who she named as a Defendant in the same case, and knew to be represented by counsel.

118. By communicating with a person she knew to be represented by another lawyer, Ms. Rose violated Rule 4.2(a) (Communication With Persons Represented By Counsel).

COUNT NINE
(Violation of 8.2 (Judicial Officials))
(OPC Matter)

119. Rule 8.2 (Judicial Officials), Rules of Professional Conduct, provides that:
"A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or of a candidate for election or appointment to judicial office."

120. Ms. Rose filed a motion to recuse a judicial official and in support made disparaging remarks about the judge.

121. By making Public statements regarding the integrity of a judge that she knew or should have known to be false or with reckless disregard, Ms. Rose violated Rule 8.2 (Judicial Officials).

COUNT TEN
(Violation of 8.4(d) (Misconduct))
(OPC Matter)

122. Rule 8.4(d) (Misconduct), Rules of Professional Conduct, provides that: "It is professional misconduct for a lawyer to engage in conduct that is prejudicial[to the administration of justice."

123. Ms. Rose filed numerous pleadings and claims that were frivolous.

124. Ms. Rose continued to file frivolous pleadings even after being warned and sanctioned,

125. Ms Rose's conduct caused significant delays and expense.

126. By continuing to file frivolous claims and pleadings, Ms. Rose engaged in conduct prejudicial to the administration of justice, and thereby violated Rule 8.4(d) (Misconduct).

COUNT ELEVEN
(Violation of 8.4(d) (Misconduct))
(Smith Matter)

127. Rule 8.4(d) (Misconduct), Rules of Professional Conduct] provides that; "It is professional misconduct for a Lawyer to engage in conduct that is prejudicial to the administration of justice."

128. Ms. Rose filed numerous pleadings and claims that were frivolous.

129. Ms. Rose continued to file frivolous pleadings even after being warned and sanctioned.

130. Ms. Rose's conduct caused significant delays and expense.

131. By continuing to file frivolous claims and pleadings, Ms. Rose engaged in conduct prejudicial to the administration of justice, and thereby violated Rule 8.4(d) (Misconduct).

COUNT TWELVE
(Violation of Rule 84(a) (Misconduct))
(OPC and Smith Matters)

132. Rule 8,4(a) (Misconduct), Rules of Professional Conduct, provides that "It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another,"

133. As set forth in this Complaint, Ms. Rose violated the Rules of Professional Conduct and thereby violated Rule 8.4(a) (Misconduct), Rules of Professional Conduct.

PRAYER FOR RELIEF

WHEREFORE, the Office of Professional Conduct requests:

1. That the appropriate disciplinary sanction be imposed against Ms. Rose;
2. That the Court order Ms. Rose to pay the costs of prosecution to the OPC;
3. For such other relief as the Court deems just.

DATED this 12th day of December, 2007.

UTAH STATE BAR

Barbara L. Townsend

Assistant Counsel Office of Professional Conduct

DATED this 10th Day of December, 2007

/s/Arthur B. Berger, Chair Ethics end Discipline Committee

(Stamped -This pleading filed on behalf of the Utah State Bar. Office of Professional Conduct as directed by the Ethics and Discipline Committee of the Utah Supreme Court:
Utah State Bar—Office of Professional Conduct
645 South 200 East
Salt Lake City, Utah 84111)

Sinajini v. Board of Education, 964 F.Supp. 319 (D. Utah 1997). Appeal Pending, Tenth Circuit Court of Appeals.

Meyers v. Bd. of Educ. Of San Juan, 905 F.Supp. 1544 (D. Utah 1995). (discrimination in education in San Juan County regarding Indian Students and 1975 consent decree to stop discrimination was not carried out 25 years)

State v. Pharris, 846 P.2d 454 (Utah App. 1993), *cert. denied*, 857 P.2d 948 (Utah 1993)(regarding under representation of Indian jurers, giving third party standing for cognizable racial group in San Juan County, adopting J.Durham's dissent in Negley)

Redd v. Negley, 785 P.2d 1098, 1100 (Utah 1989)(San Juan County regarding under representation of Indians in the jury pool, Justice Durham dissenting)

Superior Oil Co. v. Merritt, 619 F. Supp. 526, 531 (D.C. Utah 1985) (reversed to determine if Navajo agencies acted in bad faith obligated by *Nat'l Farmer's) Superior Oil Col v. U.S., 798 F.2d 1324* (10th Cir. 1986) (suit over oil leases, access).

United States v. Jim, 409 U.S. 80 (1972)(Utah Navajo Trust Fund is within Congressional authority, and District Court was correct to charge Utah to comply with the 1933 Aneth Extension Act statutory scheme.)

Yanito v. Barber, 348 F. Supp. 587 (D. Utah 1972) (three-judge court)(failure of County Election Clerk to provide Indians with information regarding the candidate qualification was a Constitutional right violation).

Sakezzie v. Utah Indian Affairs Commission, 198 F.Supp. 218, 225 (D. Utah 1961), later proceedings, 215 F.Supp. 12, 17 (D. Utah 1963)(Utah Trust Fund improperly overseen by the State)

State of Utah v. United States, 304 F.2d 23 (10th Cir. 1962), *cert. denied*, 371 U.S. 826. 1962.C10.40161 http://www.versuslaw.com[15] (State of Utah was a litigant in federal court and therefore had no immunity from the Federal Court assigning costs to the State as a litigant).

United States of America v. San Juan County, Docket Number C-83-1286 W (D. Utah 1984) (voting).

United States of America v. San Juan County, Docket Number C-83-1287 (D. Utah 1984) (voting).

Sinajini v. Board of Education, U.S. District Court for Utah Docket Number 2:74-CV-346-W (D. Utah 1975) (education).

Keith v. Smith, San Juan District Court Docket Number 3606 (1974) (juries).

Pelt v. State of Utah, 104 F.3d 1534 (10th Cir. 1996) ongoing (trust fund suit)

Neztsosie v. Meyer, 883 P.2d. 920 (Utah 1994).

In re S___ J___, 576 P.2d 1280 (Utah 1978).

State ex rel. Goodman, 531 P.2d 478 (Utah 1975).

Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230 (3 judge panel) and 523 F.2d 1 (10th Cir. 1975) (En Banc).

In re R.N., 527 P.2d 1356 (Utah 1974).

Young v. Felornia, 244 P.2d 862 (Utah 1952).

State v. Crank, 142 P.2d 178 (Utah 1943) (overruling State v. Wells, 100 P. 681 (1909)).

3. Navajo Cases, Utah, Generally:

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997).

National Indian Youth Council v. Bruce, 366 (10th Cir. 1973), cert. denied, 417 U.S. 920 (1974).

Matter Of Adoption Of Halloway, 732 P.2d 962 (Utah 1986).

4. Indian Cases, Utah, Generally:

State v. Hagen, 802 P.2d 745 (Utah App. 1990), *Rev'd*, 858 P.2d 925, *aff'd* 114 S.Ct. 958, 127 L.

Ed2d 252 (1994) (overruling Ute Indian Tribe v. State of Utah, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 949 (1986)). See also State v. Coando, 784 P.2d 1228 (Utah App. 1989), *remittitur stayed*, 858 P.2d 926; State v. Perank, 858 P.2d 927 (Utah 1992); State v. Gardner, 827 P.2d 980 (Utah App. 1992), *cert. denied*, 836 P.2d 1383, and further proceedings 844 P.2d 293 (Utah 1992); Roosevelt City v. Gardner, 858 P.2d 1004 (Utah App. 1992).

Brough v. Appawora, 553 P.2d 934 (Utah 1976), *cert. granted and case remanded*, 431 U.S. 901 (1977).

Allen v. Merrell, 305 P.2d 490 (Utah 1956), *vacated*, 353 U.S. 932 (1957).

5. Navajo Cases, Non-Utah, Generally.

Navajo Nation v. New Mexico, 975 F.2d 741 (10th Cir. 1992), cert. denied ___ U.S. ___, 123 L.ed 2d 150, 113 S. Ct. 1583 (1993)

Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 840-841 (1982).

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

State ex rel Merrill v. Turtle, 413 F.2d 683, 686 (9th Cir. 1969).

Dodge v. Nakai, 298 F.Supp. 26 (D. Ariz. 1969).

Hot Oil Service v. Hall, 366 F.2d 295 (9th Cir. 1966).

Navajo Tribe v. United States, 364 F.2d 320 (Ct.Cl. 1966).

Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685 (1965).

Healing v. Jones, 210 F.Supp. 125 (D. Ariz. 1962), *aff'd* 373 U.S. 758. See also, 174 F.Supp. 211 (D. Ariz. 1959).

Industrial Uranium Co. v. State Tax Commission, 387 P.2d 1013 (Ariz. 1963).

Oliver v. Udall, 306 F.2d 819 (D.C. App. 1962).

In re Lynch's Estate, 377 P.2d 199 (Ariz. 1962).

Montoya v. Bolack, 372 P.2d 387 (N.M. 1962).

Navajo Tribe v. National Labor Relations Board, 288 F.2d 162 (D.C. App. 1961), *cert. denied*, 366 U.S. 928.

Your Food Stores, Inc. v. Village of Espanola, N.M., 361 P.2d 950 (N.M. 1961).

Williams v. Lee, 358 U.S. 217 (1959).

6. Law Review, Other Scholarly Legal Publications, Indians, Utah:

Doing Business on an Indian Reservation: Can the Non-Indian Enforce His Contract With the Tribe?, 1981 B.Y.U. L. Rev. 319.

Orme, Tucker Act Jurisdiction Over Breach Of Trust Claims, 1979 BYU 855, 870-872.
Tribal Sovereignty and the Supreme Court's 1977-1978 Term, 1978 B.Y.U. L. Rev. 911.

The "Right of Tribal Self-Government" and Jurisdiction Of Indian Affairs, 1970 Utah L. Rev. 29.

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Utah State Bar Office of Professional Conduct 645 South 200 East Suite 205 Salt Lake City, Utah 84111-3831 Telephone (801)531-9110 • FAX; (801) 531-9912 1-800-698-9077 Email opc@utahbar.org

February 4, 2008
Susan Rose
9553 South Indian Ridge Drive
Sandy, UT 84092

Re: Your Informal Complaint Against Carolyn Cox
OPC File No: 07-0812

Dear Ms. Rose: I reviewed your Informal Complaint with the other attorneys In this office. We concluded, upon consideration of all factors, your Informal Complaint must to dismissed for the reasons summarized below. You alleged that Ms. Cox who was opposing counsel in a federal matter, engaged in several instances of alleged misconduct, including *inter aila*,

withholding evidence, and after initially remaining silent, falling to later correct certain misinformation given to the court.

First, Ms. Rose, a review of the information you submitted reveals the majority of the allegedly violative conduct occurred, during 2002. Moreover, it appears you were aware of the facts giving rise to the alleged professional conduct violations on the dates they occurred. Pursuant to Rule 14 529 of the. Utah Rules of Lawyer -Discipline end Disability, all proceedings alleging an attorney violated the Utah Rules of Professional Conduct must begin within four years of the discovery of the alleged professional conduct violations. With regard to the acts that occurred more than four years before the date your Information was submitted, we are precluded from pursuing them further by the statute of limitations.

Second, with regard to the conduct you allege occurred in 2005, wherein Ms. Cox indicated to the- court that she had provided 'every document we had in the health district," these allegations arise out of the above conduct, barred by the running of the statute, and are themselves barred.

However, even so, these allegations are still more appropriately addressed in another forum. The OPC does not ordinarily intercede in matters such as a Rule 60(b) Motion, request for a new trial, an appeal, or issues one should raise through a Petition for Extraordinary Writ. In our view, these are matters you should address in another forum, such as the court of original jurisdiction or an appellate court.

In fact, you did address these matters to the court, In your September 8, 2006 Rule 60(b) Motion. In its *Order* re: *Plaintiff Lyman & Valdez Rule 60(b) Motion and the Health District Defendants' Motion for Sanctions,* filed September 28, 2007, the Court issued its Order denying your Motion, and finding that its prior rulings were not the product of a fraud upon the court perpetrated by defendants' counsel, including Ms. Cox. In so finding, the court relied not just on "the colloquy with counsel at pre trial,' as you allege, but also on "the facts supporting those claims as proffered *by plaintiffs' counsel,'* (Emphasis in original.) **Therefore, because the court found no misconduct on the part of Ms. Cox or any other of defendants' counsel with regard to the facts alleged, and because the court relied on facts provided by you in its findings, the evidence is insufficient to establish there is probable cause that Ms. Cox ' violated the Rules of Professional Conduct.**

Because your allegations are either barred by he statute of limitations, or should be and were addressed by a court, the OPC, pursuant to Rule 4(b)(3)(B) of the RLDD, is exercising its prosecutorial discretion: by declining to prosecute, and the case will be dismissed. If, however, a court later finds that Ms. Cox engaged in professional misconduct in the course of the underlying case, you may submit the findings to the OPC and we will determine whether they warrant reopening your case.

We nevertheless thank you for bringing this matter to our attention. Your concerns aid the OPC in monitoring the professional conduct of attorneys in Utah.

Pursuant to Rule 14-510(a)(6) of the Rules of Lawyer Discipline and Disability, as amended on January 1, 2003, you may appeal this decision to the Chair of the Ethics and Discipline Committee of the Utah Supreme Court within Fifteen days after the date of this letter. If you wish to appeal the decision notify this office in writing, and we will forward the file to the chair for review.

Sincerely,
s/Margie Wakeham
Assistant Counsel
Office of Professional Conduct

FARMERS INSURANCE GROUP OF COMPANIES

April 23, 1999

Reid M. Wood
San Juan Hospital
P. O. Box 308
Monticello, Utah 84535

RE: Claimant Doom Singer, Fred Riggs and Alison Dickson ClaimNo,: A5-008125

Dear Mr. Wood: - Thank you for notifying us of this claim. Famer's Insurance Group (hereinafter, "Farmers") is pleased to inform you that it is prepared to defend this suit on behalf of San Juan Health District, You should be aware however, that Farmers may not ultimately be required to pay any settlement or judgment in this case. This is because certain facts alleged, if proven, may preclude or limit the policy

coverage accordingly, the defense which Farmer's offers is subject to its reservation or rights to deny coverage later for either defense or indemnity.

The purposes of this letter are to provide you with the name, address, and telephone number of counsel whom Farmers has selected and retained to defend you, to explain Farmers understanding of mob counsel's role in defending this action on your behalf and to identify certain questions concerning your entitlement to coverage in this action, and to reserve Farmer's rights.

A. Appointment of Counsel

To protect *San* Juan Hospital's interests, Farmer's has retained R. Dennis Ickes, professional corporation, ... W. Arlene Way, Centerville, Utah 84014, (801) 357-25db to defend this matter on your behalf. Mr. Ickes sole responsibility is to afford the hospital with a completely independent defense. The hospital has the sole right to control that defense. Mr. Ickes does not represent Farmers and has no obligation to protect Farmer's interests in this matter. Farmers expects Mr. Ickes to vigorously protect the insured's rights and only their rights.

Because the hospital's defense is being assumed under a reservation of rights, the sole responsibility of Ms. Ickes will be to afford a completely independent defense, subject to the hospital's right of control and without any obligation to represent Farmers interest in this matter.

In order to enable Farmers to do its job, Farmers requests and expects that <u>both the hospital and defense counsel will disclose to Farmers all</u>

information concerning the claim (except privileged matters relevant to overage issues) , will timely inform and consult with Farmers on all matters relating to this claim, as both statute and the Policy require. Farmers also requests that you provide us with the identity of any other insurance policy or policies which may potentially cover the events involved and inform us whether a defense as been tendered to any other carrier, and tell us their response.

B. Farmers' Policy May Not Cover All or Part of This Claim

As you know, this action arises out of an alleged termination of plaintiff Singers' employment, a reduction a pay for plaintiff Riggs and the failure to provide plaintiff Dickson with permanent employee [sic status] to which he was entitled. **The complaint alleges that plaintiffs were denied their right tp due process, right to free speech, right of equal protection, right of privacy, defamation, fraud, wrongful termination, discrimination, retaliation, and intimidation.**

Based upon our review of the claims being made against the hospital in this matter, considered in light of the potentially applicable insuring agreements and the governing law, we are obliged to inform you that there are certain questions concerning your entitlement to coverage in this litigation. Your policy provides comprehensive hospital liability under the Comprehensive Hospital Liability Policy # 01175-3330. **The specific areas where, depending upon the facts as they develop, coverage may not be available, include the following: the claim of discriminatory**

attitudes and conduct against the protected class of Native Americans; the claim of unwillingness to repay money owed to the Utah NavajoTrust Fund; the claim of arbitrary and capricious and erratic threats made against Native Americans; the claim of unlawful discharge of an employee, the claim of unfairly disciplining employees; the claim of unlawfully depriving an employee of full time status; alleged violation of the Utah Special District Personnel Management Act, alleged violation of the Navajo Preference in Employment Act, and the claim of denying Navajo people the health care they prepaid for with their land in the Treaty of 1868.

1. Anv liability Exceeding Policy Limits Is Not Covered

Farmers [and any excess carriers, will not pay any amount exceeding (its/their respective) policy *limits.*

2. *There is no Coverage For Intended Or Expected Personal Injury* The Policy only covers liability caused by an "occurrence." **(Policy,** "IV, &1; VI, & *39b).)* As respects , the Policy defines an "occurrence" as an event or series of events, including injurious exposure to conditions, proximately caused by an act or omission of the insured regardless of the number of persons or objects affected, which results during the period in personal injury, neither expected nor intended from the standpoint of the insured. (Policy, VI, & 3(b)). The complaint alleges possible willful and intention acts and violations of statutory or decisional law. If any personal injury plaintiff ... is proven to have bee4n intended or expected by the insured, then there would be no coverage under coverage's A9a) and B.

3. Only Limited coverage is Provided For Discrimination Damages. The Policy does not provide coverage for "any fines, penalties, injunctive reliefs imposed by law, plaintiff attorneys' fees, back wages, front wages, and administrative fees for which the hospital becomes liable arising from discrimination suits (Policy, V.& 4.) The complaint alleges discrimination. To the extent plaintiffs' suit is one for discrimination, liability for any of the relief specified above would not be, covered.

4, The Policy Provides No Coverage For Liability Arising Out Of The Insured's Breach Of Any Contract Or Agreement The policy excludes coverage for liability "arising out of breach of any contract or agreement by the insured" or "assumed by the insured under any contract." The complaint suggests violation of certain contracts or agreements with the Navajo Nation. Any liability arising out of a breach of any such excluded contact or agreement would not be covered.

5. Farmer's Policy Is Excess Of Other Insurance The Policy affords coverage to the hospital's executive officer, administrators, department heads and trustees only in excess over any other applicable insurance. (Policy VI & 13, see III & (a)

As the litigation progresses and as the facts and legal issues develop, it is possible that some of the coverage questions may resolve and that other coverage issues may emerge. **Farmers asks the insured and their counsel to please be sure to provide Farmers with copies of any amended pleadings, with timely reports concerning the lots and legal issues as they develop, and with advise concerning any change in the factual or legal basis for plaintiffs claims.**

C. Reservation of Rights Above, we explained why it is possible there may not be coverage for this claim even though. Farmers has agreed to defend and ma later settle or participate in a settlement in this suit. If the facts establish no coverage, Farmers may not be obliged to continue your defense and would not be obligated to indemnity any judgment that may be rendered or to pay any settlement that may be reached and may, in some circumstances, be entitled to and may seek reimbursement of any defense or indemnity payments that are determined never to have been owing. **We want the hospital to understand this so that it can conduct the defense with coverage issues in mind.**

Because coverage questions exist, Farmers expressly reserves the following rights with respect to each identified coverage question: (1) to deny coverage; (2) to refuse to pay some or all of any judgment or settlement in this matter; (3) to obtain reimbursement from the insured in event that Farmers pays all or any portion of a judgment or settlement that is determined not to be covered under the policy; (4) not to be bound by, or to contest, any determination, finding, stipulation, settlement, or judgment insofar as it affects or purports to affect coverage issues or entitlements in this action; (5) to timely withdraw from the lawsuit's defense should factual or legal developments eliminate any potential for coverage under the facts alleged; and to decline to ***pay***, and to obtain reimbursement of, any defense charges allocated or apportioned to the defense of claims that do not fall within the Policy's potential coverage.

The hospital's continued acceptance of a defense subject to the above reservations in no way constitutes or suggests a waiver by the hospital of the right to contest the validity of any decision which may be made by Farmers with respect to these reservations. Similarly, the fact that Farmers is furnishing and will continue to furnish a defense under a reservation of rights, is investigating this matter, and may, in the future attempt to negotiate or actually negotiate a compromise or settlement, or pay a judgment on the hospital's behalf do not constitute a waiver by Farmers of its right to assert any of the rights which have been reserved.

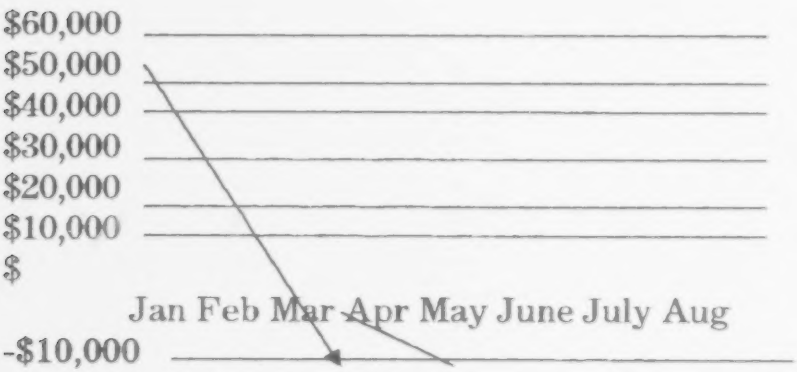
Finally, we wish to inform you that this letter is not being sent to the law firm Farmers has retained to defend the hospital in this litigation. While you are free to discuss in confidence anything you please with such counsel, and while we strongly recommend that you finish a copy of this letter to, and discuss with such counsel all facts and issues related to this case including the reservations in this letter, it is entirely your decision whether you desire to discuss coverage issues with such counsel.

Please contact me with any questions that you may have. Your time, cooperation and understanding have been greatly appreciated.

Sincerely Yours

/s Ron P. Fulkerson
Claims Management Specialist Farmers Insurance Group Healthcare Professional' Liability Division

Montezuma Creek Statistical Graph of Net Income reflecting drop in patient visits at the clinic for the Time Private Billing and Charging Patients Payments-at-time-of-service began when defendants were telling Navajo Court the Plaintiffs were 'bold faced liars' re: their actions



STATE OF UTAH

JUDICIAL DEPARTMENT

Attorney's Certificate

In the Supreme Court of the State of Utah

UNITED STATES OF AMERICA
STATE OF UTAH

I, Pat Bartholomew, Clerk of the Supreme Court of the State of Utah, do hereby certify that by an Order of this Court duly entered, Susan Rose was admitted to practice as an Attorney and Counselor at Law in all the Courts of the State of Utah, on the 15th Day of October, 1997.

I further certify that this Attorney is now, and at all times since admission has been, a member of this Bar in good standing, and that the private and professional character of this Attorney appears to be good.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, this 17th Day of February, 2010.
/s/ Pat Bartholomew, Clerk

(Seal of the Court is affixed)